

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Nos. 77-1136, 77-1137.

To be argued by: MARTIN G. WEINBERG.

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

KEVIN T. COONEY AND
HAROLD J. LEVY,
APPELLANTS.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Defendants-Appellants Kevin T. Cooney
and Harold J. Levy.

MARTIN G. WEINBERG,
OTERI & WEINBERG,

Of Counsel:

JEANNE BAKER,
ROSENBERG, BAKER & FINE,
133 Mt. Auburn Street,
Cambridge, Massachusetts 02138.
(617) 354-2937

Ten Post Office Square,
Boston, Massachusetts 02109
(617) 227-3700

On the Brief:

STEPHANIE CLEVERDON.

BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS.

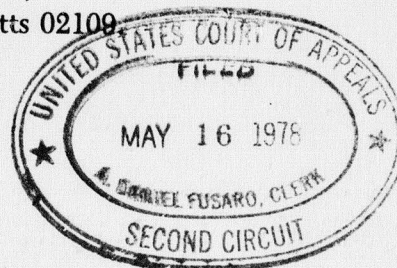




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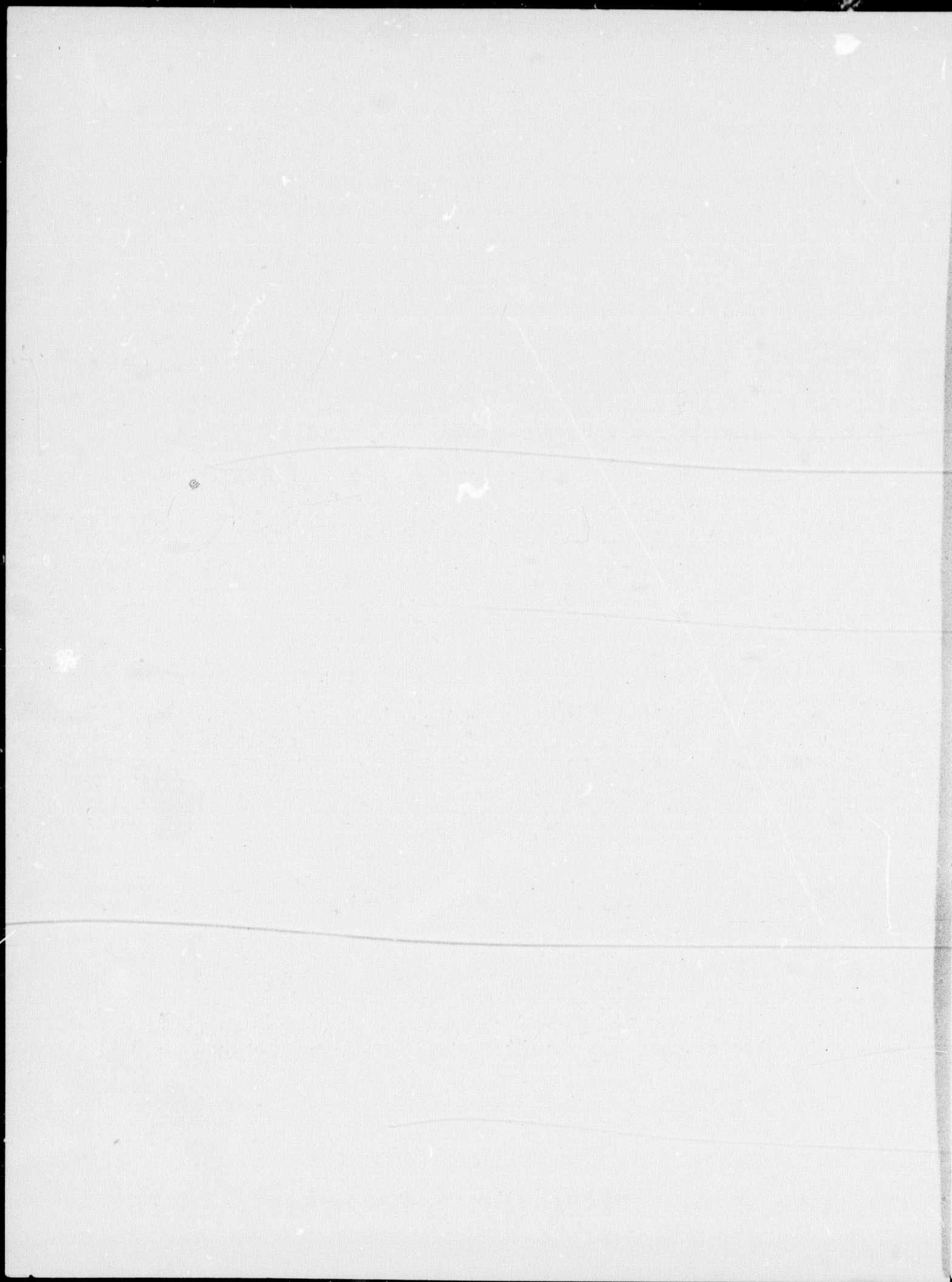
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1136
No. 77-1137

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN T. COONEY, HAROLD J. LEVY, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The
Northern District of New York

BRIEF FOR DEFENDANTS APPELLANTS

Q U E S T I O N S P R E S E N T E D

- I. Whether a conspiracy conviction based upon seriously prejudicial evidence falling outside the specific terms of the indictment, and relating to an entirely separate and independent operation -- and accordingly at variance with the indictment -- must be reversed?
- II. Whether in light of an assertion of proprietary or possessory interest in the goods seized, sufficient, if true, to confer standing

to challenge the search, appellants are entitled to an evidentiary hearing on the issue of standing?

III. Whether in light of record evidence that perjury was committed before the grand jury of which the government may have had knowledge, appellants are entitled to an evidentiary hearing on the issue of the government's knowledge of that perjury and its materiality to the indictment?

IV. Whether in light of the failure of the government to make known what efforts, if any, it made to locate a missing informant witness, appellants are entitled to a hearing on the issue of the government's compliance with its duty of making reasonable efforts to secure an informant's availability?

V. Whether in light of the direct evidence of one juror's confusion as to the conspiracy charge and the circumstantial evidence suggesting improper use by the jury of notes taken by the jury foreman, appellants are entitled to a new trial, or at the very least to an evidentiary hearing, on the issue of the impairment of the jury's deliberative process?

S T A T E M E N T O F T H E C A S E

Appellants Kevin T. Cooney ("Cooney") and Harold J. Levy, Jr. ("Levy") appeal from judgments of conviction entered on December 12, 1976, after a three week jury trial in the United States District Court for the Northern District of New York, Chief Judge James T. Foley presiding. Appellants were each sentenced, on one count of conspiracy to distribute marijuana in violation of 21 U.S.C. §846, to 18 months imprisonment with a special parole term of two years (A. 612,613).^{1/} Both filed Notices of Appeal on February 23, 1977 (A. 3, 6).

Summary of Prior Proceedings^{2/}

On February 4, 1976, appellants were indicted, along with fifteen co-defendants, on one count of conspiracy to distribute marijuana in violation of 21 U.S.C. §841(a)(1) "from about the month of July, 1972 through the month of June, 1975, at or near Albany, in the State and Northern District of New York, and elsewhere" (A. 7). In furtherance of this conspiracy, five overt acts were alleged, all concerning delivery, or possession with intent to deliver, of quantities of marijuana ranging from 300 to 500 pounds at or near the Albany suburbs of Latham and Crescent, New York. Appellant Levy was named in five of these overt acts, and Appellant Cooney in one (A. 8). The Indictment also contained five additional counts

^{1/} Numbers bearing the suffix "A." refer to pages of Appellants' Appendix; numbers with the suffix "Tr." refer to pages of the trial transcript.

^{2/} A detailed statement of the facts and specific prior proceedings relevant to each of the issues raised on this appeal is set out separately at the beginning of each section of Argument.

of possession naming Appellant Levy (Counts II through VI) and five additional counts of possession and distribution naming Appellant Cooney (Counts II, V, VI, VII, and VIII), but all counts except the conspiracy count were dismissed with prejudice to the government before trial (A. 204).

Of the fifteen named in the indictment, only Appellants Cooney and Levy, and two co-defendants, John Lefebvre ("Lefebvre") and Bruce Kay ("Kay"), proceeded to trial. While each was represented by separate counsel, the four who stood trial joined in all applications and objections made by defense counsel during the course of trial, unless otherwise indicated (A. 204a).

The trial commenced on December 1, 1976, and concluded three weeks later, on December 22, 1976, after thirteen days of trial.

Prior to the opening of the evidence at trial, defense counsel moved for production of various documents within the possession and control of the government. Among these were the grand jury minutes of one Margaret Buecher, whom the government had identified one day earlier as an informant in the case who would be unavailable for trial (A. 200, 206). Defense counsel also requested that the prosecuting attorney make known to the defense "what efforts, if any, the Government has made to locate this witness" (A. 206). The court declined to instruct the government to reveal such efforts, if any (A. 209), but later in the trial did order that Buecher's grand jury testimony be turned over to the defense (A. 291).

The government's case in chief opened with the testimony of five alleged co-conspirator witnesses: Robert Roth, Marc Cohen, William Katz, Paul Cammuso, and Paul Moscovitz. This testimony, if believed, provided evidence of an arrangement between appellants, their co-defendants and others to transport Mexican marijuana first to Tucson, Arizona, where Appellant Cooney resided, and then from Tucson, Arizona by automobile to

the home of Appellant Levy, first in the Albany suburb of Latham and then in the Albany suburb of Crescent, New York, where it was to be distributed for further sale. Additional details of this testimony are described at relevant sections of this brief, infra.

During this phase of the trial, defendants moved for a mistrial on account of testimony by witness Katz as to marijuana dealings with one Richard Hessing in Westover, Vermont, relying on grounds of lack of prior notice and lack of connection of this testimony to the defendants on trial (A. 278, 281). The court denied this motion and permitted the evidence to be admitted (A. 278, 281).

At the conclusion of this phase of the trial defendants objected in advance to the introduction of evidence of the arrest in New Mexico and subsequent search of an automobile driven by one Andrew Blossy, which resulted in the seizure of \$25,450 in cash, two garment bags with marijuana residue, and two boxes of heavy-duty shock absorbers. This automobile, the evidence was to show, had been sent by one Michael Hauser from Ithaca, New York, to Appellant Cooney in Tucson, to transport money intended for a purchase of marijuana. Defendants objected vigorously to the introduction of this proposed evidence on essentially two grounds: first, that in light of their assertion of a propriety or possessory interest in the money seized and in the automobile searched sufficient to confer standing, they were entitled to an evidentiary hearing under Rule 41(e) of the Federal Rules of Criminal Procedure on disputed issues of fact, relevant to the validity of the search under the Fourth Amendment; and second, that in any event, the evidence stemming from the arrest and search of the Blossy vehicle was not evidence of the conspiracy for which defendants were being tried,

but was at best evidence of a separate and unrelated conspiracy and therefore at variance with the indictment (A. 378-421). The court, rejecting both arguments, refused to hold an evidentiary hearing and ruled that this disputed evidence could be admitted (A. 397-399, 421).

Thereafter, the government presented the testimony of New Mexico State Police Sgts. Robert Tripeer and Charles Ring, DEA Agent James Montagne, and alleged co-conspirator Michael Hauser in reference to the events arising out of the arrest and search of the Blossy vehicle. Further details of this testimony are presented at relevant sections of this brief, *infra*. After the testimony of Tripeer, the first of these witnesses, the defense renewed its objection to this evidence on the ground that it was evidence of a separate conspiracy at variance from the indictment (A. 434-447), an objection which the court again denied (A. 445). The defense also moved to strike certain prior testimony related to this new evidence, but the court declined to exclude it from the record (A. 446-447).

At the close of the government's case, Appellants Levy and Cooney moved to dismiss the indictments against them on the grounds that there was insufficient credible evidence to support a verdict of guilty beyond a reasonable doubt, and that the admissions made by witness Moscowitz under cross-examination at trial -- that he had perjured himself before the grand jury -- necessitated dismissal of the indictment (A. 490-490a). These motions too were denied. The defense then presented its case, which consisted of the playing of a tape-recording of two telephone conversations between Appellant Cooney and witness Moscowitz which occurred on July 8 and 12, 1976, in which Moscowitz stated, inter alia, that he possessed information proving that testimony presented to the grand jury was a lie and

that the indictment was "no good" (A. 491c). After this, the defense rested.

Following the closing arguments of counsel, and the judge's charge, the jury returned to begin its deliberations. Approximately twelve and a half hours later, on December 22, 1976, at 11:35 p.m., the Foreman announced the jury's verdict, finding all four defendants guilty as charged (A. 535a). During the individual polling of the jurors, Juror Number 10, Judith Earl, stated that as to defendant Kay "I would like to say not sure" (A. 536). This expression of doubt prompted a colloquy with the judge which is described in detail infra and which formed the basis for motions by the defendants to set aside the verdict, which were denied (A. 559). Another objection to the jury process raised by defendants at this point concerned the handwritten notes which the Foreman, Juror Number One, Charles Chow, had been observed taking during the trial. (See A. 226-227.) Defendants requested an evidentiary hearing on the role played in the jury deliberations by these notes, but although the judge filed the notes in the record as a Court Exhibit (A. 547), the motion for a hearing was denied. Subsequently, on February 15, 1977, the trial court issued a Memorandum - Decision and Order (A. 598), denying defendants' formal written motions brought pursuant to Rule 33 of the Federal Rules of Criminal Procedure challenging the propriety of the jury's deliberative process.

S U M M A R Y O F T H E A R G U M E N T S

I. Appellants' convictions upon evidence at variance with the indictment must be reversed, as this evidence seriously prejudiced appellants' substantial rights. The government, under an indictment charging appellants with

participation in a Tucson-Albany marijuana conspiracy, introduced damaging and prejudicial evidence of events relating to an entirely separate and unconnected drug-dealing venture between Ithaca and Tucson. The government's own evidence demonstrated that the Albany operation and the Ithaca venture were not related or interdependent and, therefore, were at variance with an indictment charging a single conspiracy, under the rule of United States v. Miley, 513 F.2d 1191 (2nd. Cir., 1975), cert. den., 423 U.S.

842. Unlike the Tucson-Albany evidence, which was entirely the product of accomplice and hearsay testimony, the evidence of the Ithaca venture was in large part derived from testimony of law enforcement officers and presented the jury with its first concrete images of money and marijuana, and, therefore, undoubtedly had a substantial influence upon the jury's verdict, so that under the standards set by Kotteakos v. United States, 328 U.S. 752 (1946), the verdict cannot stand. Pages 11-32.

II. An evidentiary hearing must be held upon the issue of Appellants' standing to challenge the legality of the search of the Blossy vehicle. Rule 41(e) of the Federal Rules of Criminal Procedure mandates that such a hearing must be held on any facts necessary to decide a suppression motion. Here, where Appellants asserted a sufficient "possessory or proprietary interest" to give them standing to object to the search and its fruits, they were entitled to a hearing to develop the factual record needed to support that claim, and the trial court's denial of their request for such a hearing was in error. Pages 33-42.

III. Appellants are also entitled to an evidentiary hearing on the issue of whether the government knew that material testimony presented before the

grand jury was perjured. The government is under a Fifth Amendment duty to immediately inform the court and opposing counsel of any perjury in testimony upon which an indictment is based. United States v. Basurto, 497 F.2d 781 (9th Cir., 1974). Here, where one of the government witnesses at trial admitted to inaccuracies and untruthfulness before the grand jury, and indicated that government agents had been on notice prior to his testifying that he was a liar, appellants are entitled to a hearing to determine the extent and timing of the government's knowledge of this perjurious testimony. Pages 43-50.

IV. An evidentiary hearing is required on the issue of the government's failure to locate its informant, Margaret Buecher. Fundamental requirements of fairness demand that the government afford the defense "reasonable cooperation" in securing the appearance of government informants, United States v. D'Angiolillo, 341 F.2d 453 (2nd Cir., 1965). Where, as here, government informants are unavailable for trial, the defense is entitled, at a minimum, to an accounting by the government of what reasonable efforts it has taken to locate the missing informant. The failure of the trial court to grant defendants' request that the government reveal the extent of its efforts, if any, to locate Buecher for the trial deprived appellants of their right to develop a factual record on this issue and was an error. Pages 51-64.

V. A new trial, or at the very least an evidentiary hearing, is required in light of evidence on the record that the jury's verdict was accepted even though the court was on notice that one juror harbored an unfulfilled need for clarification on the central legal issue of the case,

and another juror, the Foreman, may well have made improper use in the jury deliberations of notes which he took during trial. Juror Number Ten, Judith Earl, not only expressed doubts as to the guilt of Defendant Kay during the polling of the jury, but also stated that she had requested that the court review its charge on conspiracy -- a request which was never satisfied. The failure of the court to clear away her confusion regarding this vital legal issue was a dereliction of its clear duty under the principles of Bollenbach v. United States, 326 U.S. 607 (1946). In addition, in light of the record evidence concerning the dominant role played by Jury Foreman Chow in the jury proceedings, and his taking and keeping of notes while within the jury room, an evidentiary hearing was required to determine whether or not, as the record strongly suggests, Chow's notes were used improperly to influence the jury's verdict.

Pages 65-85.

A R G U M E N T S

I. APPELLANTS' CONVICTIONS UPON EVIDENCE AT
VARIANCE WITH THE INDICTMENT MUST BE REVERSED
IN LIGHT OF THE SERIOUSLY PREJUDICIAL EFFECT
OF THIS EVIDENCE ON APPELLANTS' SUBSTANTIAL
RIGHTS.

Statement of Relevant Facts and Proceedings

Appellants' Cooney and Levy were indicted (A. 7-12), along with fifteen co-defendants, of conspiracy to distribute marijuana "from about the month of July, 1972 through the month of June, 1975, at or near Albany . . ." in violation of Title 21, U.S.C. §841(a)(1)^{3/} (A. 7-12). In furtherance of this conspiracy, five overt acts were alleged. All of these acts concerned the delivery or possession of quantities of marijuana in and around the Albany suburbs of Crescent or Latham, between July, 1972 and November, 1974. Of the original 17 persons indicted, only appellants and 2 others eventually came to trial.

At the trial, the government's case in chief consisted of two phases. In the first phase, the testimony of five alleged co-conspirators was presented. Three of these co-conspirator witnesses -- Roth, Cohen, and Katz -- had been named with appellants in the original indictment; two of them -- Cammusia and Moscovitz -- had not.^{4/} All five had been residents of the Albany, New York area during most of the period covered

^{3/} Appellants were also charged in several substantive counts on the same indictment, but all counts except the conspiracy count were dropped before trial (A. 204).

^{4/} Prior to trial, Roth's case had been dismissed under a pre-trial diversion program upon his agreement to cooperate with the government; Cohen had been permitted to plead guilty to simple possession of marijuana, and his conviction had been deferred under the provisions of 21 U.S.C. §844(b)(1); Katz had pleaded guilty to the conspiracy count, had been adjudged a youthful offender, and had received a suspended sentence; and Moscovitz and Cammusia had been granted immunity in exchange for their testimony. See Tr. 224, 690, 1545-1546.

by the indictment; Roth, Cohen, and Katz having been fellow students of appellants at S.U.N.Y. at Albany (A. 218, 231, 248); Cammusa having been a student at the Albany College of Pharmacy (A. 293); and Moscovitz having owned and operated a bookstore and a Western clothing and jewelry store in the Albany area (A. 304, 313).

Viewed in the light most favorable to the government, the testimony presented in this first phase of the trial indicated that the five co-conspirator witnesses were acquainted with one another and with appellants; and that they were involved in the buying and selling of marijuana and other drugs in the Albany area, sometimes in connection with appellants and sometimes through unrelated transactions of their own. More specifically, the testimony in the first phase indicated that an arrangement existed between appellants, their co-defendants, and others whereby quantities of marijuana would be obtained from Mexico and delivered to a residence rented by appellant Cooney in Tucson, Arizona, to the home of appellant Levy, first in Latham and then in Crescent, New York, both suburbs of Albany, and there distributed to a variety of buyers for further sale. Witnesses Cohen, Katz, and Moscovitz participated in this operation by driving car loads of marijuana from Tucson to Albany (A. 232-237, 239-245, 249-254, 256-261, 264-266, 320-321); witnesses Roth, Cohen, Katz, and Moscovitz by assisting in the unloading of marijuana at appellant Levy's home, and witness Cammusa by buying quantities of marijuana from Lefebvre and Katz (A. 219, 221-225, 238, 255, 262-263, 267, 307).

As proof of this scheme, the government offered testimony describing a trip with appellant Cooney to buy marijuana in Mexico (Moscovitz, A. 314-317), description of trips back and forth between Tucson and the Albany area to transport marijuana to Albany or return an empty car to Tucson

(Cohen, A. 232-237, 239-245; Katz, A. 249-254, 256-261, 264-266; Moscowitz, A. 320-321) and descriptions of the arrival and unloading of marijuana at appellant Levy's houses in the Albany suburbs (A. 219, 221-225, 238, 255, 262-263, 267, 307).

The testimony presented in this first phase of the trial also contained various fleeting and obscure references to drug-related dealings unconnected to the overt acts listed in the indictment or to the Tucson-Albany operation described above. This evidence included reports of hearsay conversations and descriptions by witnesses Katz and Cammuso of various drug transactions of their own in Vermont, the Southwest, California, and Boston. Five of these references are significant to this appeal.

The five references are: 1) Roth testified that appellant Cooney had told him that he, Cooney, "was in Ithica [sic], New York, and to other places in the Midwest" (A. 220). 2) Katz testified that appellant Levy had told him that "someone who was driving for himself had been stopped in New Mexico and a large quantity of money" -- which Katz recalled to be "approximately twenty-thousand dollars to twenty-five thousand dollars" (A. 269-270) -- "had been taken from the person by authorities" (A. 269) and that Levy was "responsible for half of this monetary loss" (A. 271). 3) Cammuso testified that witness Moscowitz had told him in November, 1974 that "there had been some money confiscated from a driver in Texas" (A. 296), "approximately thirty-five thousand dollars." 4) Moscowitz testified that appellant Levy had told him that one "Andy Blossy" had driven some money across the country and had been stopped in New Mexico (A. 371b-371c). 5) Katz testified that one Richard Hessing bought fifty pounds of marijuana from him at a house in Westover, Vermont in which Katz was then living with appellant Levy (A. 273-276). Katz further testified that a

white Chevrolet camper which he saw parked in the driveway of the Westover house in January of 1975 contained 400-600 pounds of marijuana which he and Levy moved into the attic of the house (A. 272-273, 279-281).^{5/}

As the record establishes, the proof offered by the government throughout the entire first phase of its case -- directed towards establishing the operation of the alleged conspiracy to deliver marijuana from Tucson, Arizona to the Albany area -- was exclusively based on the testimony of the five alleged co-conspirator witnesses and the hearsay statements that these witnesses attributed to appellants.^{6/} Indeed, not one shred of physical or documentary evidence, nor one word of testimony by a disinterested, uninvolved witness was introduced

^{5/} The defense objected to the Katz/Vermont evidence and moved for a mistrial on the grounds that there had been no mention of a Richard Hessing in any pre-trial proceedings (A. 274, 277-278) and that no foundation had been laid to connect this Vermont incident in any way with the Tucson-Albany conspiracy charged in the indictment (A. 276-278, 281). Defense counsel also moved to strike the Katz and Moscovitz testimony regarding alleged conversations with Levy when it became clear, later in the trial, that the government had completely failed to lay any foundation for admitting such statements under the co-conspirator exception to the hearsay rule as being in furtherance of the alleged conspiracy (A. 477-478). The trial judge denied all these motions (A. 278, 281, 477-478). See pp. 17-18, infra, for further discussion of this and other related objections.

^{6/} It appears from the record that the government was forced to rely solely on accomplice testimony because there had been no official investigation of the alleged conspiracy during the time period within which it allegedly existed. The government's evidence apparently only came to light after the fact, in June of 1975, when Moscovitz approached state and federal narcotics agents seeking to exchange his information of drug dealing activities for the government's assistance with three state narcotics charges pending against him. Moscovitz did, in fact, receive recommendations of probation from the Drug Enforcement Administration and State Police, and immunity from prosecution for a conspiracy charge (see Tr. 1531-1533, 1545-1546, 1552), but a state judge nevertheless sentenced him to five years in jail on a charge of possession of cocaine, and he was serving this sentence when he testified at trial.

during this phase.^{7/} Furthermore, not only was the credibility of the five co-conspirator witnesses subject to normal doubtfulness inherent in accomplice testimony, but their reliability was additionally undermined on cross-examination when Cohen, Camusa and Moscowitz accused Roth and Katz of lying (A. 246-247, 298-303, 346, 376) and Moscowitz explicitly admitted that he had lied to a DEA agent, and had perjured himself under oath before the grand jury and in his testimony at trial (A. 331-332, 336, 338-340, 347, 364-368, 371a-371b, 372-373, 375; see A. 491c, 491f).

The second phase of the government's case-in-chief took an entirely different form and conveyed to the jury an entirely different quality of evidence. During this phase, the government introduced the testimony of three law enforcement officers -- Sergeant Tripeer and Sergeant Ring, of the New Mexico State Police, and Agent Montagne of the Drug Enforcement Administration -- concerning events arising out of the stopping of a vehicle for speeding in New Mexico on September 27, 1974 (A. 423-424). A subsequent search of this vehicle and of its driver, Andrew Blossy,^{8/} resulted in the discovery of two boxes of heavy-duty air shock absorbers (A. 425), approximately \$25,000 in cash in the trunk of the vehicle (A. 431) and of a slip of paper in Blossy's possession with the name "Kevin" on it, and a telephone number listed next to it (A. 471-473, 482). Agent Montagne further testified about the

^{7/} The government did introduce into evidence a letter from Christine Cooney, wife of appellant Cooney, to witness Moscowitz (Govt. Ex. #5). However, this letter, a thank you note for Christine's recent stay at Moscowitz's home in Albany, New York, related almost entirely to details of the American Indian jewelry business in which Moscowitz and the Cooneys were involved, and in no way, either overtly or by implication, suggested drug dealings.

^{8/} Despite the government's announced intention to call Blossy as a witness (A. 217), without explanation the government failed to produce him.

contents of three telephone calls he made to the "Kevin" number (A. 483-489) -- a number stipulated to be one listed to Christine Cooney, appellant Cooney's wife (A.491a-b). According to Montagne's testimony, these calls, in which Montagne posed as Blossy, indicated that "Kevin" was expecting Blossy to arrive with the money and that he, Blossy, could drive a "load" back for \$1,000 (A. 480-489).^{9/} The government also introduced the testimony, in regard to this New Mexico incident, of alleged co-conspirator Hauser, who stated that he had arranged in Ithaca, New York -- where both he and Blossy resided -- to have Blossy drive this car with the money from Ithaca to Cooney in Arizona to buy marijuana for Hauser. He further stated that all his marijuana dealings were "totally" in the Ithaca area, and that prior to trial he had only been in Albany on one occasion (A. 468).

This second phase of the government evidence, viewed in the light most favorable to the government, established that from Ithaca witness Hauser had marijuana dealings with appellant Cooney in Arizona. But, there was not a scintilla of evidence introduced in this second phase of the trial to link the Blossy search or the Ithaca drug connection to any of the Albany witnesses, nor in any way to the Tucson-Albany conspiracy which was the subject of the first phase of the trial. This second phase did, however, cast a new light on the cryptic references in the first phase of the trial to "Ithaca," "New Mexico," "Texas" and "Andy "Andy Blossy" (see p. 13, supra) -- references which could now be seen to relate not to marijuana operations in Albany, but to the Ithaca-Tucson/

^{9/} Although Montagne testified that he had tape recorded the three telephone conversations, he claimed that two of the tapes were lost and the third unavailable for technical reasons; therefore, the jury heard only testimony of Montagne's recollections (Tr. 1785-1788).

Blossy trip.

Defense counsel raised vigorous objection, prior to the opening of the second phase of the trial, to the introduction of the evidence relating to the search and service of the Blossy vehicle and the subsequent phone calls arising out of it, on the ground that "it is not part of the conspiracy charged in the indictment" (A. 418).^{10/} In support of this motion, defense counsel called to the trial court's attention the testimony which Blossy had given before the grand jury which, defense counsel argued, "establish[es] beyond any question that this trip from Ithaca to Arizona had really nothing to do with the Levy house that we have heard about for these past three weeks and Arizona, the Cooney to Levy trips that we have heard about throughout the course of this trial" (A. 405). Indeed, a perusal of Blossy's grand jury testimony reveals that Blossy knew none of the defendants and had never been in Albany during the period covered by the indictment (A. 125-127, 129). In further support of this motion, defense counsel also relied upon a diagram appearing in the Drug Enforcement Administration's May 20, 1976 Report of Investigation (introduced as Defendant's Exhibit "D" for identification, A. 570) showing that the Ithaca operation was "a separate, independent operation" from the Tucson-Albany conspiracy alleged in the indictment and the subject of the first phase of the trial (A. 435). Finally, the defense relied upon an advance proffer of the testimony of Hauser "to demonstrate . . . that there was no connection between this \$25,000 seizure, the Ithaca operation, and Kay and Lefebvre and Levy"

^{10/} Defense counsel also moved to suppress this evidence on the ground that it resulted from an illegal search and seizure to which they had standing to object. The judge ruled that they had no standing and denied their motion (A. 399). See pp. 33-42 for argument on this point.

(A. 441). Then, when Hauser actually had testified before the jury, defense counsel also moved to strike from the record the hearsay testimony of Katz and Moscowitz which had been introduced during the trial's first phase concerning alleged conversations of these two witnesses with Levy in regard to the seizure of a sum of money from a driver in New Mexico (A. 477). The trial judge denied all of these motions, permitting the second-phase Blossy-Ithaca evidence to go in, and the first-phase Katz and Cammuso testimony to stand. It is the admission of this evidence which appellants contend was plainly erroneous, and substantially prejudicial to appellants' right to a fair trial for the crime for which they were indicted.

Argument

The Trial Court Erred In Allowing Evidence
At Variance With The Indictment-Charge Of
An Albany Conspiracy To Go To The Jury Where
Such Evidence Could Not But Have Had A
Substantial Influence Upon The Jury's Verdict.

Introduction

It is not unusual -- as this Court has explicitly recognized -- for the government's evidence at trial in a drug conspiracy prosecution to establish a pattern of operations at variance with the crime charged in the indictment. United States v. Russano, 257 F.2d 149 (2d Cir. 1975); United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), cert. denied, 423 U.S. 842; United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975); United States v. Moten, 564 F.2d 620 (2d Cir. 1977). The critical question is whether that variance was such "as to 'affect the substantial rights' of the accused," Berger v. United States, 295 U.S. 78, 82 (1935)

quoted in United States v. Miley, supra, 513 F.2d at 1207, thereby requiring that the conviction be reversed.

In deciding this question, the appellate court is required, as the United States Supreme Court has explained, "to substitute judgment for automatic application of rules." Kotteakos v. United States, 328 U.S. 752, 760 (1946). But the legislation on which such exercise of judgment is premised -- the so-called "harmless error" statute, 28 U.S.C. §2111, and its counterpart Rule 52(a) of the Federal Rules of Criminal Procedure -- does not change the fundamental principle, recognized by Congress, that the government carries the burden of obtaining convictions without resort to use of unfair and prejudicial evidence. Thus, Congress has said, if evidence is erroneously introduced which "is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it." H.R. Rep. No. 913, 65th Cong. 3d Sess. 1 (commenting on the import of 28 U.S.C. §391, the predecessor to the present 28 U.S.C. §2111) discussed in Kotteakos v. United States, supra, 328 U.S. at 760.

As this Court, and the United States Supreme Court, have recognized, there is not single "precise border" rule which separates the fatal variance from the tolerable one. Kotteakos v. United States, supra, 328 U.S. at 762; see United States v. Bertolotti, supra. Rather, each case must be judged on its own facts, in the context of the entire record of that case. United States v. Russano, supra, 257 F.2d at 715. The test for assessing whether a conviction must be overturned, however, has been defined with great precision by the Supreme Court:

"if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, supra, 328 U.S. at 765 (emphasis added).

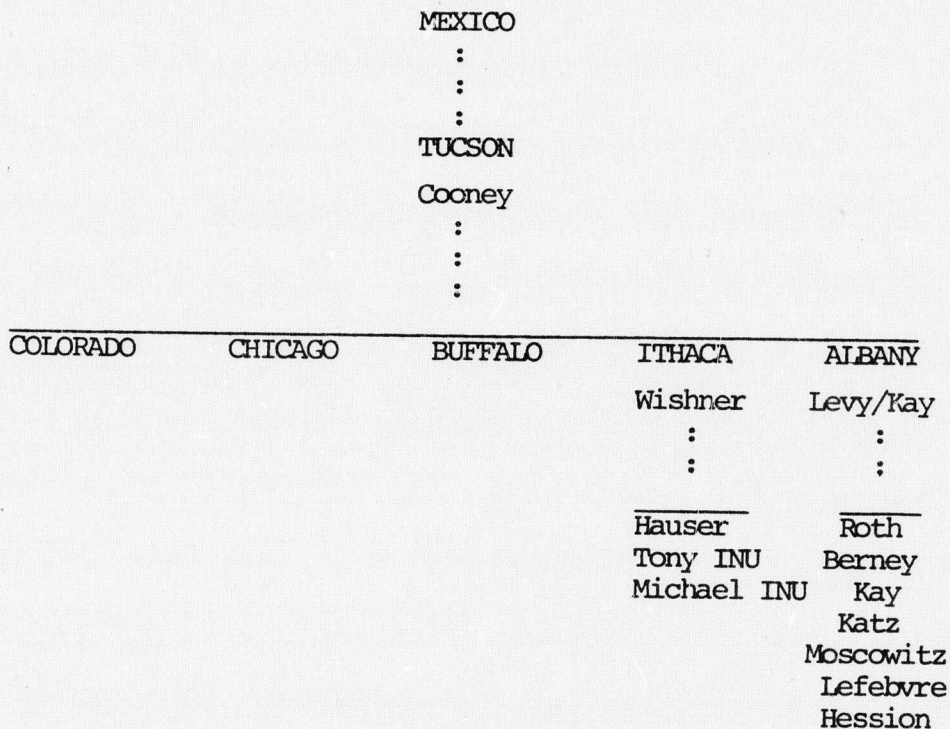
Appellants submit that there can be no doubt on the record of this case that the evidence introduced during the second phase of the trial -- evidence wholly unconnected to the Albany-Tucson conspiracy for which appellants were indicted and tried -- had a "substantial influence" on the jury's verdict, and that, accordingly, appellants' convictions cannot stand.

a) The Existence of the Variance

Consideration of the evidence introduced at trial reveals that it described two entirely separate branches of marijuana dealing -- the first running between Cooney in Tucson and Levy, Lefebvre, Kay, Roth, Cohen, Katz, Cammuso and Moscowitz in Albany; and the second between Cooney in Tucson and Hauser in Ithaca, with Blossy as the driver-go between.^{11/} This fits precisely the pattern diagrammed in the Drug Enforcement Administration's "Report of Investigation" of May 20, 1976 (A. 573), which

^{11/} There was also evidence of yet a third separate line of marijuana dealing -- that in Vermont involving Katz and Hessing -- which was unconnected with either the Cooney-Levy/Albany operation or the Cooney-Hauser-Blossy/Ithaca transaction. This evidence also was at variance with the indictment, but in itself was not as substantially prejudicial to appellants' rights as was the Blossy/Ithaca evidence.

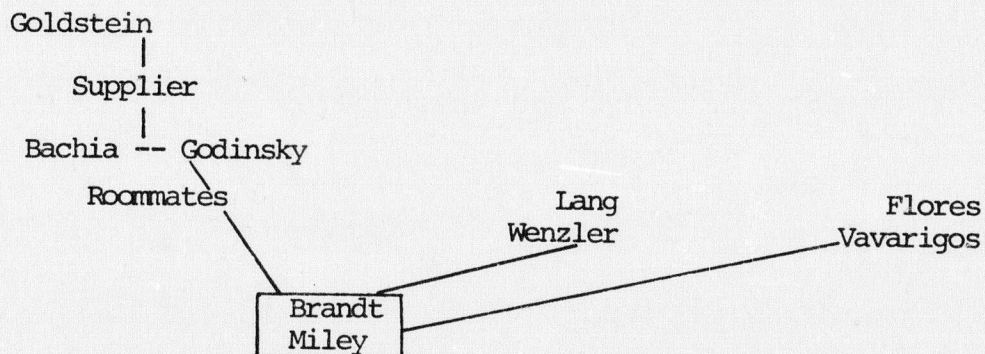
shows:



The only connecting link between the separate branches is Cooney.

It is critical to note that this branch-pattern of operations is precisely equivalent to that described and diagrammed in United States v. Miley, supra, 513 F.2d at 1206.^{12/} In Miley, undercover government agents made arrangements through defendants Brandt and Miley to purchase LSD from Godinsky, Bachia and Goldstein, cocaine and PCP from Flores and

^{12/} The following diagram is reproduced in Miley, supra, 513 F.2d at 1206:



Varvarigos, and "purple haze" LSD and PCP from Lang and Wenzler. There was ample evidence that all parties knew and regularly dealt with Brandt and Miley, and some evidence connecting Flores, Varvarigos, Lang and Wenzler to one another, but "no evidence specifically linking the persons in the left branch of the government's diagram with those in the two right branches." (Id., at 1206). Similarly here, although there was evidence in this case that the Albany parties dealt with Cooney and that the Ithaca parties did too, there was no evidence that these two groups knew or dealt with one another.^{13/} Thus, precisely as in Miley, there "appears to have been a variance between the offense charged in the indictment and the proof adduced." Id., at 1207. See also United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

Moreover, this case does not fit the patterns of evidence apparent in the "chain conspiracy" cases in which no variances have been found. See e.g., United States v. Moten, 564 F.2d 620 (2d Cir. 1977); United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975), cert. denied, 423 U.S. 832; United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). While in these cases there may be no proof that all of the parties actually knew one another and there may even be diverse geographical "links" in the chain, the critical fact in each of these cases overriding any claim of variance, is that each "link" of the "chain" is welded into a large-scale, well-established, integrated "business"

^{13/} Indeed, the government's own witness, Hauser, testified that except for Cooney he knew the defendants only socially (A. 464-465), and that his marijuana dealing activity had nothing to do with Albany (A. 468). This testimony was entirely consistent with that of the government's "Albany" witnesses, none of whom testified to knowing Hauser or Blossy, or in any way suggested that they were involved in Ithaca-connected marijuana dealings.

in which "it is clearly established that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." United States v. Moten, *supra*, 564 F.2d at 625, quoting United States v. Bynum, 485 F.2d 490, 496 (2d Cir. 1973), vacated on other grds., 417 U.S. 903 (1974), *emphasis added*.

In marked contrast, here such evidence of interdependence and mutual reliance "vital to the success of the business" is totally lacking. Indeed, according to the evidence of the government's own witness -- Hauser -- and the grand jury testimony of its "missing" witness -- Blossy -- the Ithaca operation was in no way dependent upon, vital to, or even related to the Albany operation. Accordingly, the evidence in this case cannot properly be viewed as one integrated "chain" conspiracy, but rather must be seen for what it is -- a pattern of separate dealings connected only by one common participant, thus fitting squarely under the variance rule of Miley and Bertolotti.

b) The Legal Implications of the Variance

In determining whether the variance in this case requires appellants' convictions to be reversed, the Court must apply basic legal principles governing indictment and trial to the specific factual record of this case.

It has long been a fundamental rule "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Stirone v. United States, 361 U.S. 212, 217 (1960); Ex Parte Bain, 121 U.S. 1 (1887). The main purposes of this rule are threefold: (1) to assure that the defendant is "apprised by the indictment, with reasonable certainty, of the nature of the accusation against

him . . . , " Russell v. United States, 369 U.S. 749, 766 (1962), citing United States v. Simmons, 96 U.S. 360, 362 (1878) so that he will "not be taken by surprise by the evidence offered at trial," Berger v. United States, 295 U.S. 78 (1935); (2) to insure that the scope of his protection for double jeopardy purposes is made clear, Russell v. United States, supra, 369 U.S. at 764; Berger v. United States, supra, 295 U.S. at 82; and (3) "to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge," Stirone v. United States, 361 U.S. 212, 218 (1960). The admission of the Ithaca/Blossy evidence in this case contravened the basic principles of all three of these purposes.

Lack of notice

Appellants were informed by the indictment, and the overt acts described within it, that they were to be tried for a conspiracy to distribute marijuana "at or near Albany" (A. 7). Nothing in the indictment could be deemed to have put them on notice that they would have to defend against evidence or other drug-related activity in unrelated operations in other parts of the country. (See A. 7-12.)

In Berger v. United States, 295 U.S. 78 (1935), defendants were indicted for a single conspiracy to utter counterfeit notes, but the proof established two such conspiracies, linked by only one connecting defendant. Although holding this to be a variance, the Court found that in that case there was no prejudice to defendant's case since each of the conspiracies proven were "within the words of the indictment" and there was nothing in the record to indicate that the proof "came as a surprise" (Berger, supra, at 83). Here, in sharp contrast, half the government's proof fell outside the "words of the indictment," and

appellants were forced at trial, in direct violation of their Fifth and Sixth Amendment rights to notice, to meet government evidence of acti against which the indictment did not prepare them to defend.

Russell v. United States, 151 F.2d 680 (8th Cir. 1945), is a case in point. There, a conviction was reversed on lack of notice grounds precisely because the government's case included evidence of illegal gasoline sales not alleged in the indictment. As the Court in Kempe admonished:

"Had the Government desired to introduce testimony of [such] sales, it would have been nothing more than fair to have legally and formally charged the defendant with the making of such sales. He would have thus been apprised of the charge against him and possibly have been prepared to introduce testimony to refute the truth of the charge." Id., at 687.

Similarly here, if the government intended to introduce substantial evidence of Ithaca/Blossy operations, it should have included such operations in the formal terms of the indictment -- thus putting appellants on notice and apprising them of the charges against which they would have to defend.

Double jeopardy

Since appellants are not now threatened with additional prosecutions, this issue is speculative and need be mentioned only in passing to indicate the fundamental unfairness of allowing evidence at trial to spill beyond the scope of the indictment. Appellants have now been tried not only for a Tucson-Albany operation, but also for a Tucson-Ithaca operation. If they were to be reprosecuted for Ithaca-related activities, the terms of the indictment would not reveal "with accuracy" -- as they must -- "to what extent [they] may plead a former acquittal or conviction." Russell v. United States, supra, 369 U.S. at 764. Nor do the terms of

the indictment include mention of the other operations diagrammed by the DEA -- those concerning Buffalo, Chicago, and Colorado -- which stand in the same relationship to the Albany conspiracy as does the Ithaca operation. Would appellants now be protected from further prosecution for involvement in those operations? The very posing of this question demonstrates that one of the essential functions of an indictment -- defining the extent of the defendant's immunity from re prosecution -- has been completely vitiated by the government's actions in this case.

Independent determination of grand jurors

Stirone v. United States, 361 U.S. 212, 218 (1960), is the leading case focussing on the right of a defendant not to be tried except upon evidence fitting clearly under the terms of the indictment as returned by the grand jury. In Stirone, the petitioner was tried for obstruction of interstate commerce under the Hobbs Act on an indictment charging that he had interfered with the movement of sand from various points into the State of Pennsylvania. At trial, however, the judge permitted introduction not only of evidence of sand movements into Pennsylvania, but also of steel shipments from Pennsylvania to Michigan and Kentucky. Finding that the introduction of this steel evidence provided a "new basis for conviction," and concluding that "it cannot be said with certainty that . . . Stirone was convicted solely on the charge made in the indictment" (id., at 217), the Supreme Court reversed the conviction. In so doing, the Court agreed that both bodies of evidence might have been properly received had the indictment been drawn "in general terms" (id., at 218). But the Stirone indictment had not been so drawn; rather, it had been

drawn with specific and exclusive reference to sand, and, accordingly, as the Court recognized, there was no way of knowing "whether the grand jury would have included in its indictment a charge that commerce in steel . . . had been interfered with." (Id., at 219).

This case falls squarely within the principle of Stirone. Even assuming, without conceding, that evidence of the Blossy arrest and the Ithaca operation could properly have been admitted against appellants under an indictment charging them with a conspiracy of general, unspecified, geographical scope, that is not the conspiracy for which they were indicted. As Stirone established, neither the trial judge nor the prosecutor may expand the scope of an indictment by drawing in evidence beyond the boundaries of the grand jury's determination. It is the grand jurors -- and not the judge or the prosecutor -- who set the outer limits on the charges to which a defendant may be answerable; accordingly, appellants here may not be convicted except on the basis of the specific terms of the indictment as it was returned by the grand jury.

* * *

These three basic legal rights -- the right to meaningful notice of the charges against one; the right to an indictment accurately defining the scope of one's protection from further prosecution; and the right to be tried only upon the specific charges returned by the grand jury -- were seriously eroded for appellants by the government's conduct in this case. Although a mere technical variation between indictment and proof need not mandate reversal of a conviction fairly obtained, neither can "the substantial safeguards to those charged with serious crimes . . . be eradicated under the guise of technical departures from the rules," Russell v. United States, supra, 369 U.S. at 250, quoting Smith v. United States, 360 U.S. 1, 9 (1959).

c) The Substantial Prejudice Arising From the Variance

Finally, appellants submit that consideration of the nature and extent of the effect which the variance in this case surely "had or reasonably may be taken to have had upon the jury's decision" (Kotteakos, supra, 328 U.S. at 764), overwhelmingly demonstrates that appellants were seriously prejudiced by the erroneous admission of the Ithaca/Blossy evidence.

In outline, the government's case at trial consisted of two separate and discrete halves: first, the accomplice testimony regarding defendants' alleged involvement in the Tucson-Albany marijuana conspiracy with which they were charged; and second, the testimony of police, government agents, and Hauser regarding events arising out of the stopping of the vehicle driven by Blossy from Ithaca, New York to Tucson. These two phases of the government's case differed not only in content -- the first relating to a Tucson-Albany operation, the second to a particular Tucson-Ithaca trip -- but also differed dramatically in the quality of the evidence presented. The Tucson-Albany operations were established only by the testimony of accomplice witnesses, witnesses who expressed doubts about one another's credibility and who admitted, under cross-examination, to involvement in multitudinous drug dealings of their own. Indeed, up until the introduction of the Ithaca/Blossy evidence, the jury heard and saw nothing concrete or objective which corroborated any detail of the testimony of these alleged co-conspirators. On the contrary, rather than corroboration, the jury heard substantial evidence elicited on cross-examination in support of the defense theory that witnesses Roth, Cohen, Katz and Moscowitz were, in fact, engaged in a

drug conspiracy connected to Arizona not by Cooney, but instead by one Ross Brewster and Dean Catrone (see cross-examination of "Albany" co-conspirators at Tr. 234, 299, 344, 459-460, 472-481, 503-504, 545-546, 716-717, 722-725, 837-838, 854-857, 866, 900). At the close of the first phase of the trial, then, the effect of the evidence and of the particular unreliability of these accomplice witnesses could well have left the jury with substantial doubts as to the guilt of the accused.

With the introduction of the Ithaca/Blossy evidence, however, the picture presented to the jury abruptly changed. Even though nothing in this second phase of the trial directly corroborated any of the testimony of the Albany witnesses, it did, for the first time, present to the jury concrete evidence from reliable law enforcement agents of an actual marijuana transaction. Now the jury heard for the first time from credible sources that there was, indeed, an automobile which had been driven to Tucson, that there was, in fact, marijuana debris and \$25,000 in cash in its trunk, that there were two boxes of heavy-duty air shock absorbers in its back seat, and that it was destined to arrive at Cooney's residence. By the admission of this convincing, but, in fact, unrelated evidence, the government provided a means to dispel any doubts about the Albany conspiracy which its prior evidence may have left in the minds of the jurors.^{13a/}

^{13a/} The prejudicial effect of this apparent "corroboration" was compounded by the failure of the government to produce Blossy as a witness, contrary to its announced intention to do so in the prosecutor's opening statement (A. 217). This unexplained failure deprived appellants of the opportunity to counteract the prejudicial impact of this incident by cross-examination of its main participant. The government also failed to produce the tape recordings allegedly made by Agent Montagne of phone conversations with "Chris" and "Kevin," thus depriving appellants of yet another crucial resource for cross-examination. Such failure to safeguard discoverable evidence has been seriously criticized by the courts. See e.g., United States v. Bryant, 439 F.2d 642 (1971); also see United States v. Huss, 482 F.2d 38 (2d Cir. 1973).

In United States v. Falley, 489 F.2d 33 (2d Cir. 1973), the government's proof took an equivalent form under an indictment charging defendants with conspiracy to import hashish. To prove the alleged conspiracy in Falley, the government relied on the testimony of two accomplice witnesses who described a scheme to smuggle the drug into the country hidden in table tops and brass nameplates; none of the table tops, brass nameplates or hashish involved in this alleged scheme was ever presented to the jury. Id., at 35-36. However, the government did introduce into evidence a suitcase containing hashish which had been seized from Gibbons, one of the accomplice witnesses. Gibbons testified that he had been delivering this suitcase to Stolzenberg, one of the defendants, but that it had nothing to do with the codefendants, the Falleys, who were the appellants. Id., at 36. Finding that any possible relevance of this evidence was clearly outweighed by its prejudicial value, this Court reversed the Falleys' convictions, stating:

"Had the narcotics, including the suitcase and the paraphernalia displayed here, been the subject of the indictment, their presence and introduction into evidence would have been proper -- but they were not [The government] had not been able to produce any hashish imported by the Falleys so, in effect, it went out and borrowed some The fact that the drugs produced at trial could be peripherally related to the proceedings is more of an ex post facto rationalization of the prosecution's behavior than an accurate description of its motivation." Id., at 37.

The record of this case is remarkably similar to that in Falley. Here, lacking any concrete evidence of the Albany conspiracy which was "the subject of the indictment," and perhaps doubtful of the effect of its accomplice witnesses on the jury, the government "borrowed" more convincing and creditable evidence from the Ithaca/Blossy incident to

14/
present to the jury. Clearly, the likelihood is extremely high that the incriminating nature of this evidence "spilled over" to convince the jury of appellants' guilt of the conspiracy for which they were indicted. Indeed, the government highlighted this Ithaca/Blossy evidence in both its opening and its closing statements to the jury, arguing, in effect, that such evidence counteracted the absence of concrete evidence of the Albany conspiracy (A. 216-217; Tr. 2064-2068).^{15/} A jury verdict, thus

14/
Admission of such evidence of unrelated bad acts has long been disapproved on the grounds that "it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475-476 (1948). Here, where the variant evidence directly implicated appellant Cooney (and indirectly was tied, through hearsay testimony, to appellant Levy), it certainly could persuade the jury that these were "bad men," therefore deserving of conviction regardless of their guilt or innocence of the actual crime charged. "The overriding policy of excluding such evidence despite its admitted probative value, is," according to the Supreme Court, "the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Id.

15/
Thus, in his opening statement, the prosecutor, after describing the testimony of accomplice witnesses, stated:

"But, then we are going to come to a very important part of the trial. So far you have heard from co-conspirators, accomplices and defendants. Then you are going to hear testimony about September 27th, 1974. You are going to hear that a man by the name of Andrew Blossy . . . was stopped on a highway in New Mexico for speeding, . . . that the State Police in New Mexico pulled him over, and for some reason or another, searched his automobile. When they opened the trunk of his car they discovered two clothing bags. They smelled marijuana and they found \$25,000 in cash" (A. 216).

Then, after describing more details relating to this incident, the prosecutor concluded:

"Now, you are going to hear from Mr. Blossy, we hope. You are going to hear from Mr. Hauser who sent Mr. Blossy with the money to New Mexico. You are going to hear from two police officers, Sgt. Trapeer and Sgt. Ring who made the stop of Blossy. Then you are going to hear from Agent Montagne, the man who placed the telephone call. That is the kind of evidence you are going to hear in this case" (A. 217).

obtained through the prejudicial use of evidence falling outside the scope of the indictment cannot be permitted to stand.^{16/} Accordingly, the convictions of appellants Cooney and Levy must be reversed and remanded for a new trial.

^{15/} cont. from page 31

Picking up the same theme in his closing argument, and in an effort to answer the defense contention that there were "not drugs and no marijuana [seized]" in this case, the prosecutor once again described the evidence of the Blossy incident in detail (A. 492-495a).

^{16/} Nor is this conclusion altered by the fact that in the case of United States v. Stolzenberg, 493 F.2d 53 (2d Cir. 1974), companion to the Falley case, supra, this Court declined to reverse the conviction of Stolzenberg on the same ground as the Falleys. In Stolzenberg, the Court applied a balancing test, weighing the "potentially inflammatory impact" of the suitcase evidence against its probative value, and found that "the suitcase had far greater direct evidentiary value with respect to the charges against Stolzenberg." Id., at 54. While superficially, this same logic might seem applicable to appellant Cooney in the case at bar, the critical difference is that the Ithaca/Blossy evidence had absolutely no direct evidentiary value with respect to the charge of an Albany/Tucson conspiracy for which Cooney was indicted. While Stolzenberg was indicated precisely for conspiring with Gibbons to import hashish into America -- so that the proffered "suitcase" evidence was indeed proof with "greater direct evidentiary value with respect to the charges against Stolzenberg" -- Cooney was indicted for participation in a conspiracy to distribute marijuana from Tucson to Albany -- and the Ithaca/Blossy evidence could only prejudice, and in no way prove, his guilt or innocence of that charge.

II. AN EVIDENTIARY HEARING IS REQUIRED ON
THE ISSUE OF APPELLANTS' STANDING TO
MOVE TO SUPPRESS THE FRUITS OF THE
SEARCH OF THE BLOSSY VEHICLE.

Statement of Relevant Facts and Proceedings

Sometime prior to the conclusion of the first phase of the trial (see pp. 11-15, supra), defense counsel were notified that the government intended to introduce evidence surrounding and arising from the search of the Blossy vehicle in New Mexico -- including evidence of the seizure of shock absorbers, an amount of marijuana and the sum of \$25,000 in cash (linked to appellants by Katz's testimony); and evidence of "Kevin's" incriminating telephone conversation with DEA Agent Montagne (Sec A. 378, 381, 383, 385-386).^{17/} Based on that notification, defense counsel for appellants Cooney and Levy moved, prior to the commencement of the second phase of the trial, by means of an oral application supported by a written memorandum of law ("Memorandum," A. 560), for an evidentiary hearing concerning the legality of the search of the Blossy vehicle (A. 378-378, 400). This hearing was crucial to appellants' defense because all of the evidence concerning the Blossy-New Mexico incident (see pp. 15-16, supra) was directly derivative of that search.^{18/}

^{17/} The record is not clear as to precisely when defense counsel received actual notice of the government's intention to introduce the evidence arising from the search of the Blossy vehicle. Compare A. 378, 381, 385-386 with 394-395.

^{18/} That the evidence surrounding the Blossy incident was all derived directly from the search of Blossy's automobile is clear from the trial testimony of New Mexico State Police Officers Robert Tripeer and Charles Ring and DEA Agent James Montagne:

Tripeer testified that on September 27, 1974, he stopped an automobile for speeding (A. 423-424) and observed two boxes of heavy duty shock absorbers in the back seat (A. 425). After speaking to the driver,

The government opposed the application for an evidentiary hearing contending, inter alia, that Blossy had consented to the search and therefore its legality was assured and that, in any event, appellants had no standing to raise a Fourth Amendment objection to the search of the Blossy vehicle (A. 383, 386-387).

To resolve the issue of whether or not to grant a suppression hearing, the trial court heard arguments of counsel (A. 384, et seq.)^{19/}. During these arguments, defense counsel explained that the basis of appellants' claim of standing was a claim of "proprietary or possessory" interest in the \$25,450 seized from the Blossy vehicle, as well as a claim of a constructive proprietary or possessory interest in the vehicle itself (A. 380-381, 399-400, 401-402, see Memorandum, A. 562-563). Moreover, as

^{18/} cont. from page 33

Andrew Blossy, Tripeer conducted a search of the vehicle's trunk (A. 426). In the trunk, Tripeer found two suitcases which he proceeded to search (A. 426, 431). Inside the suitcases, Tripeer found a small amount of marijuana and \$25,450 in cash (A. 431, see 472). At that point, Tripeer contacted the "narcotics sergeant" for the area, Officer Ring, and asked for assistance (A. 431-432). Upon his arrival at the scene, Ring took over the investigation and brought Blossy to the State Police Office where Ring obtained a "slip of paper" from Blossy (A. 471-473). That "slip of paper" was then turned over to DEA Agent James Montagne who had been called in for further assistance (A. 475-476, 480-481). On that "slip of paper" was a telephone number listed to Christine Cooney (A. 491a-491b) and the name "Kevin" (A. 482). In Montagne's hands, that slip of paper -- coupled with the information imparted to Montagne by Blossy -- led directly to the incriminating telephone conversation in which "Kevin" agreed that Montagne, posing as Blossy, could "drive the car back with the load" for \$1,000 (A. 484-489).

The chain thus runs directly from the search of the Blossy vehicle, to the \$25,450 in cash, to the "slip of paper," to the "Kevin" telephone conversation; indeed, it is apparent from even the minimal factual record developed concerning the search that had the \$25,450 not been found, the "Kevin" conversation would never have occurred. Accordingly, if, as appellants contend, the "consent" search of the Blossy vehicle was illegal, then the entire chain of incriminating evidence stemming directly from that search must be suppressed as the "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963).

^{19/} During the course of the arguments on this Fourth Amendment application, appellants also contended that evidence of the Blossy-New Mexico incident could not properly be introduced because it fell outside the delineation of the Albany conspiracy contained in the indictment (A. 380, 396-397, 403), and the government responded to this point (A. 390-392). This aspect of appellants' objection to the Blossy evidence is fully discussed at pp. 11-32, supra.

defense counsel pointed out, it was the government's theory of the case to impute precisely such an interest to appellants (id., see also A. 413-414). Indeed, there had already emerged, at the trial, testimony by government witness William Katz which had imputed to Cooney and Levy a definite proprietary interest in the cash seized from the Blossy vehicle. Katz testified that in October 1974,

"Mr. Levy told me that someone who was driving for him had lost a quantity of money in New Mexico. He told me that the quantity was between twenty thousand dollars and twenty-five thousand dollars, to the best of my recollection, that he [i.e., Levy] was responsible for half of this monetary loss" (A. 271).

"Mr. Levy merely told me about Mr. Cooney, and himself if they were to, say, lose twenty thousand dollars because they were, as far as Mr. Levy has told me," (A. 270).

On cross-examination, the import of this testimony was clarified.

Q. And this morning you testified that you had a conversation with Levy where Levy told you that some twenty thousand dollars was confiscated in New Mexico, and do you recall testifying to the jury this morning about that?

A. Yes, sir.

Q. And you also went on to say that Levy told you that he had to absorb fifty percent of the loss, and Cooney had to absorb another fifty percent of the loss, and do you remember that?

A. I believe that that is what Mr. Levy told me, yes, sir" (A. 283).

In its argument to the trial court opposing a suppression hearing, the government failed entirely to address the assertion of proprietary interest raised by appellants and documented by the record.^{20/} Before reaching a decision on the appellants'

20/ Subsequent to the arguments on standing, Michael Hauser did testify (in response to a plainly leading question by the prosecutor) that he "owned" the money which was found in the Blossy vehicle (A. 454). However, Hauser also testified that he, Hauser, had given the money to Blossy to deliver to Cooney in Tuscon (A. 455-458).

application, the trial court explored with the government the possible need for an evidentiary hearing:

"The Court: I wonder, is your position that we do not need an evidentiary hearing on the question of standing, Mr. Dreyer?

Mr. Dreyer [for the government]: No, we do not need an evidentiary hearing on the issue of standing. However, if the court finds standing, then the next question would be whether or not Officer Trapper [sic] conducted a proper search.

The Court: By consent?

Mr. Dreyer: By consent.

The Court: Of course that is a factual proposition?

Mr. Dreyer: That is correct" (A. 390).

Subsequently, the trial court reiterated "of course, consent necessitates a hearing" (A. 393).

The trial court denied, however, the application for an evidentiary hearing, stating:

"Well, first I think there is a question under Rule 41E of untimeliness, but I am not going to stand absolutely on that in regard to the application for a hearing on suppression based on the ground of illegal search and seizure, because it is my judgment now, and it has been a quick review of course in 20 minutes or so . . . that there is legally a lack of standing here made on behalf of these two defendants [Cooney and Levy] . . . (A. 397-399).

There was not present, at the time of this search, any interest, proprietary or possessory shown (A. 398-399).

It is my decision that the need for a hearing is not shown because it is a legal ruling that there is a lack of standing apparent (A. 399, emphasis added).

Argument

The Trial Court Erred In Denying Appellants
The Opportunity To Demonstrate, Through An
Evidentiary Hearing, That They Have Standing
To Object To The Search Of The Blossy Vehicle.

Ruling that as a "legal" matter appellants Cooney and Levy lack standing to object to the search of the Blossy vehicle, the trial court denied appellants' application for an evidentiary hearing challenging the admissibility of the Blossy evidence on Fourth Amendment grounds.^{21/} In so doing, the court not only deprived appellants of the opportunity to contest the legality of the Blossy "consent" search -- concededly an issue involving disputable facts (see A. 390, 393) -- it also erred in preventing the appellants from developing the very factual record which would support their assertions of standing.

Rule 41(e) of the Federal Rules of Criminal Procedure provides the crucial guideline for when an evidentiary hearing on a Fourth Amendment claim must be held. See Hoffritz v. United States, 240 F.2d 109 (2d Cir. 1956). The Rule states, "The judge shall receive evidence on any issue of fact necessary to the decision of the motion" (emphasis added). The language is mandatory and pursuant to this language courts have repeatedly

^{21/} While the trial court indicated that there was a question about the timeliness of the application (A. 397), it did not in any way rest its decision upon that ground (see A. 399). In any event, since, as noted above (p. 33, n. 17), there is some dispute as to when defense counsel actually received notice that the government would seek to introduce the evidence surrounding the Blossy search, the issue of timeliness cannot be resolved on the record of this case as it now stands. Accordingly, should this Court find the timeliness issue critical, an evidentiary hearing would be necessary to determine whether adequate notice was given and when.

held that a defendant is entitled to an evidentiary hearing if . . . alleges facts entitling him to relief and his allegations raise genuine issues of fact. See e.g., United States v. Masiello, 434 F.2d 33 (2d Cir. 1970), cert. denied, 404 U.S. 1060; United States v. Thorenson, 428 F.2d 654 (9th Cir. 1970).

The trial court here attempted to circumvent the plain mandate of this rule by asserting that its decision on standing was a "legal" one and therefore no evidentiary hearing was necessary. By this assertion, the trial court may have meant one of two things: either that appellants had failed to allege facts which if true would establish standing; or, that their allegations failed to raise any genuine issues of fact. Under either view, however, the trial court's ruling cannot be sustained. As will be demonstrated below, appellants' assertions with respect to their proprietary interest are, if true, sufficient to support a finding of standing on either or both of two independent grounds. Moreover, with respect to both grounds, unless appellants' assertions are indeed taken as true, important factual issues remain to be resolved.^{22/}

The first ground for appellants' claim of standing arises from their asserted proprietary interest in, or ownership of, the \$25,000 in cash seized from the Blossy vehicle. That an ownership interest in property

^{22/} To be sure, this Court has on occasion stated that standing is a "question of law." United States v. Torterello, 533 F.2d 809, 812 (2d Cir. 1976), cert. denied, 429 U.S. 894; and where essential facts go uncontested, this is undoubtedly the case. The Supreme Court has explicitly recognized, however, that factual issues may, indeed, arise with respect to the issue of standing to challenge a search. See Simmons v. United States, 390 U.S. 377 (1968), where the Supreme Court noted, "there will be occasions . . . when a defendant's testimony will be needed to establish standing." 390 U.S. at 390. As shown below, even a cursory examination of the standing issues in the instant case reveals that on the record of this case there are factual disputes which are, as yet, unresolved.

seized during a search confers standing to object to the search itself was clearly established by the Supreme Court in United States v. Jeffers, 342 U.S. 48 (1951). The Court there stated,

"The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein." 342 U.S. at 52.

As noted by the Seventh Circuit in a recent decision following Jeffers, the Supreme Court has never in any way modified the Jeffers rule. United States v. Alewelt, 532 F.2d 1165, 1167 (7th Cir. 1976), cert. denied, 429 U.S. 840.^{23/} See also United States v. Haes, 551 F.2d 767 (8th Cir. 1977); United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867. Nor is the use of the word "own" of special significance as far as the rule of Jeffers is concerned; that case confers standing on all defendants having a broadly described "proprietary or possessory interest" in the articles seized. United States v. West, 328 F.Supp. 545, 551 (D.Del. 1971), rev'd on other

^{23/} Nor does a fair reading of Brown v. United States, 411 U.S. 223 (1973) modify the Jeffers rule. Though there is dicta in that case which may be read as implying that a proprietary interest in property seized does not confer standing, there is far stronger and clearer language to the contrary:

"Petitioners, however, alleged no proprietary or possessory interest in [the] premises [here the search occurred] or in the goods seized there. Nor was any evidence of such an interest presented to the District Court." 411 U.S. at 225-226 (emphasis added).

". . . [P]etitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the goods [seized] . . ." 411 U.S. at 228.

grounds, 453 F.2d 1351 (3rd Cir. 1972).^{24/}

Jeffers and its progeny clearly establish that the mere fact that a defendant is not present during a challenged search or that his property is not in his possession when seized, does not thereby strip him of his standing to contest the search and seizure. In Haes, supra, the defendant shipped packaged films via a freight office, where, when the consignee could not be located, the packages were searched; yet, the Court held that the defendant clearly had "the requisite proprietary interest to assert standing" to challenge the search. 551 F.2d at 769-70. Similarly, in Canada, supra, authorities searched the defendant's suitcase while it was in a companion's possession; yet, the Court held that, "the fact that [the defendant] was not openly exercising control over the suitcase immediately prior to the search does not defeat her standing." 527 F.2d at 1378. Thus, in the instant case, the mere fact that the \$25,000 in cash was located in the trunk of the vehicle driven by Blossy when the search and seizure occurred is not dispositive of the standing issue. If, as asserted through Katz's trial testimony (see pp. 13, 35, supra), that money belonged to Cooney^{25/} and Levy, then Cooney and Levy have standing to contest its seizure.

^{24/} Although the Fifth Circuit did recently hold in United States v. Smith, 550 F.2d 277 (5th Cir. 1977) that ownership of articles seized does not, in itself, confer standing to challenge their seizure, this case conflicts sharply with the Jeffers rule and must be treated, therefore, as wrongly decided. While the Smith court relied on certain dicta from Brown v. United States, supra, in reaching its decision (see 550 F.2d at 283), it ignored entirely other statements in Brown, quoted in footnote 23 above, implicitly recognizing that an ownership interest in goods seized would be sufficient to confer standing.

^{25/} It has been recognized that when the denial of a Fourth Amendment suppression motion is reviewed by an appellate court, evidence elicited at trial may be considered. United States v. Griffin, 555 F.2d 1323, 1326, n. 3 (5th Cir. 1977). That is especially true, where, as here, no evidentiary hearing on the issue of suppression has been held. Moreover, that the testimony concerning the appellants' interest comes in the form of hearsay is also no objection to its sufficiency since United States v. Maddock, 415 U.S. 164 (1974) demolished any bar to relying on hearsay evidence in connection with a Fourth Amendment motion to suppress.

Nor does the fact that Hauser's subsequent trial testimony (see p. 35 n. 20, supra) appears to contradict the information introduced through Katz vitiate appellants' claim to standing. On the contrary, Hauser's testimony, that the money was his (A. 454) (although admittedly at least intended for Cooney (A. 458), raises precisely the kind of factual dispute which cannot properly be resolved without an evidentiary hearing on the issue of standing. Indeed, it would only be at such a hearing that defense counsel could avail themselves of the opportunity to cross-examine Hauser on this point, seeking to demonstrate that the money was in fact "owned" by Cooney and Levy, not Hauser; plainly, to have done so before the jury would have risked exposing their clients to even more damaging evidence than had already emerged. At an evidentiary hearing, moreover, appellants would have the opportunity to introduce additional evidence regarding their proprietary interest in the money, as well as evidence concerning the alleged "consent" search itself.^{26/}

The second ground for appellants' standing arises from their assertion of a proprietary interest in the actual vehicle which was searched. It is recognized that a defendant's proprietary interest in a vehicle confers standing on the defendant to object to a search of its interior (United States v. Burke, 506 F.2d 1165 (9th Cir. 1974), cert. denied, 421 U.S. 915; United States v. Mulligan, 488 F.2d 132 (9th Cir. 1973, cert. denied, 417 U.S. 930), even though the defendant is not present during the search. Cask v. Williams, 455 F.2d 122 (6th Cir. 1972). Nor

^{26/} As Blossy was not called as a government witness -- despite the government's announced intention in its opening to the jury to call Blossy to the witness stand (A. 191) -- the appellants had no opportunity at trial to examine Blossy with respect to the facts surrounding the search.

does the mere fact that, as here, the vehicle is not registered to the defendant deprive the defendant of standing. In Mulligan, supra, the Court held that the defendant had standing to object to the search of a car registered in a fictitious name. Similarly, in Burke, the defendant gained standing through equitable "ownership" of a vehicle registered to the defendant's brother. Indeed, these cases make it clear that a defendant need not show a traditional property interest in, or title to, the automobile, in order to secure standing. In Burke, for instance, the Court concluded from the defendant's frequent use of a van that he possessed a sufficient interest for standing purposes. 506 F.2d at 1171. If the assertions of defense counsel regarding appellants' proprietary interest in the vehicle driven by Blossy (A. 402-403) are true, then standing surely obtains; to determine if those assertions are true, and the extent of the interest in fact, an evidentiary hearing is plainly required.

Accordingly, in light of appellants' alleged proprietary interests both in the vehicle which was searched and in the cash which was seized -- and in light of the genuine issues of fact surrounding these assertions of interest -- it cannot be doubted that appellants are entitled to an evidentiary hearing on the issue of their standing. Moreover, in view of the serious prejudice to the appellants from the introduction of the Blossy evidence (see pp. 28-32, supra), this total denial of the opportunity to present evidence demonstrating that suppression of that evidence was required is error which cannot, under constitutional standards, be deemed harmless. See Chapman v. California, 386 U.S. 18 (1967).

III. AN EVIDENTIARY HEARING IS REQUIRED ON
THE ISSUE OF WHETHER THE GOVERNMENT
KNEW THAT MATERIAL TESTIMONY PRESENTED
TO THE GRAND JURY WAS PERJURED.

Statement of Relevant Facts and Proceedings

The record of this case reveals instance after instance in which government witness Paul Moscovitz admits to inaccuracies in his testimony and to outright lying. Most of these admissions occur during the course of his trial testimony (see e.g., A. 331-332, 336, 338-340, 345-345d, 347, 360-362, 364-368, 371a-371b, 372-373, 375); others occur during the course of the surreptitiously tape-recorded telephone conversation between Moscovitz and Appellant Cooney, introduced by the defense in support of its case. (See A. 491c, 491f.) It is plain from these admissions that Moscovitz's veracity as an important prosecution witness at trial was, at best, highly questionable. Moreover, several of Moscovitz's admissions of untruthfulness or inaccuracy concern the testimony which he gave before the grand jury. Indeed, during the tape recorded telephone call Moscovitz stated to Cooney, "I have enough information so that your attorney . . . can discredit me . . . so that he can prove to the judge or to the jury . . . [t]hat the original testimony in the Grand Jury was a lie. It was false and the indictment was no good" (A. 491c). (See A. 339-342, 360, 368, 491c-491e; also see A. 331-332, 491f.)

Additionally, Moscovitz's trial testimony and recorded telephone statements raise the possibility that informant Meg Buecher also lied before the grand jury. (See. A. 343-345, 491c-491f.)

Further, while most of Moscovitz's grand jury-related admissions

of untruthfulness do not touch upon the issue of the government's knowledge, two segments indicate that the government may well have been on notice even before Moscovitz appeared in front of the grand jury, that Moscovitz was a liar. Thus, at A. 331-332 this colloquy ensued:

- "Q. Now, isn't it a fact that you told Agent Tripp that you never drove back any Marijuana, that there was a misunderstanding with Meg, and you returned to the state of New York?
- A. Correct.
- Q. And when you told that to Agent Tripp, was that the truth, or was that a lie?
- A. That I --
- Q. That you didn't bring back Marijuana in June of 1974 -- you lied to Mr. Tripp?
- A. Right, that was a lie.
- Q. And that was before you went to the Grand Jury?
- A. Correct.
- Q. Now, before going into the Grand Jury, did you tell Mr. Dreyer [the prosecutor] that you lied to Agent Tripp when you told him, on September 26th, 1975, that you never brought back Marijuana from Arizona? Did you tell it to him? And I refer to this gentleman here, did you tell him you lied about that to Agent Tripp?
- A. No, I told Ray Tripp.
- Q. And when did you tell Agent Tripp that you lied?
- A. When he was questioning me about -- about Meg Boucher.
- Q. And when you went into the Grand Jury, did you tell those good people there that listened to your story that you had lied about this trip?
- A. No. -
- Q. And when was the first time that you ever told Mr. Dreyer the fact that you lied about this trip, or did you ever tell it to him?
- A. From what I understood, he was supposed to have learned it from Mr. Tripp."
- 

And at A. 360, the following exchange occurred:

"Q. And you never told Mr. Dreyer [the prosecutor] that you were lying, I am sure of that? [sic]

A. Is it your statement that I lied to the Grand Jury?

Q. Did you ever tell Mr. Dreyer that you lied?

A. On one statement, yes.

Q. On one?

A. Yes." ^{27/}

At the close of the government's case, the defense unsuccessfully moved to dismiss the indictment on the ground that from Moscovitz's trial testimony "it is quite evident . . . that he did commit perjury and that he did admit saying things in the grand jury that were absolutely a lie, therefore rendering, at this point, that indictment insufficient to go to the jury" (A. 490a).

^{27/} At another point in his cross-examination, in response to the question, "with respect to your grand jury testimony, did you ever tell anyone that your testimony in the grand jury was a lie, it was false and the indictment was no good?" Moscovitz answered "Yes" (A. 368). However, no time frame or identity of the recipient of this information was established in connection with this question.

It should be noted further that a comparison between Moscovitz's testimony before the grand jury and his testimony at trial reveals substantial discrepancies in the versions of events which Moscovitz related on each occasion. See e.g., Moscovitz's grand jury allegations of heroin distribution and money laundering (A. 29-31, 44-45, 63-68, 70), which are nowhere repeated at trial. At least one explanation for these discrepancies is that at some point in time before Moscovitz testified at trial, the government realized or learned that Moscovitz's grand jury testimony as to certain matters was inaccurate or untrue and the government decided therefore to avoid eliciting that testimony from Moscovitz before the petit jury. The record is silent, of course, as to whether this occurred, and, if so, when.

Argument

Appellants Are Entitled To A Determination
As To Whether The Government Knew, Before
Jeopardy Had Attached, That Testimony Material
To The Grand Jury's Deliberations Had Been Perjurious.

In Wood v. Georgia, 370 U.S. 375, 390 (1962), the Supreme Court spoke of the necessity to have an "independent and informed grand jury." In its present form, however, the grand jury is not fully independent; it relies on the prosecutor to prepare and present the criminal cases which come before it, and to aid in its task "to return only well-founded indictments." Branzburg v. Hayes, 408 U.S. 665, 688 (1972). The prosecutor's considerable power carries with it concurrent responsibilities; one of these is the duty "not to permit a person to stand trial when he knows that perjury permeates the indictment." United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974); see also United States v. Guillette, 547 F.2d 743 (2d Cir. 1976), cert. denied; United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975).

Moscowitz's trial testimony, if believed, indicates that he, and possibly also informant Meg Buecher, lied to the grand jury and, moreover, that on at least one occasion and possibly two, he had notified the government of his own untruthfulness in front of the grand jury. Nonetheless, nowhere in the minutes of Moscowitz's or Buecher's grand jury appearances (A. 14-92, A. 132-197), or in any other portion of the record of this case, does the government admit to perjury by its witnesses. In view of the mandate of Basurto and its progeny -- namely, that the government may not permit a defendant to stand trial upon an indictment known by the government to be infected by perjurious testimony -- an evidentiary hearing is required in this case to determine the nature

and significance of the witness-perjury before the grand jury and whether in fact the government had timely notice of it.

In Basurto, the Court held:

"... the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjury is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel -- and, if the perjury may be material, also the grand jury -- in order that appropriate action may be taken." 497 F.2d at 785, 786.

The Basurto Court based its decision on a series of Supreme Court cases "which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *Id.*, at 786. Significant among these is Napue v. Illinois, 360 U.S. 264 (1959), in which the prosecution's use of known false testimony at trial required a reversal of the petitioner's conviction. In holding that the same result must obtain when the government allows a defendant to stand trial on an indictment which it knows to be based even in part on perjured testimony, the Basurto Court recognized:

"The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court." 497 F.2d at 786.

To protect the defendant's rights, therefore, the government is required to disclose discovered perjury to the court and to the defense and, if discovered in time, to the grand jury itself.

While the majority in Basurto based its holding on the requirements of due process, the same result could have been reached through

the court's exercise of its supervisory powers with respect to the administration of justice in the federal courts. Basurto, supra (Hufstедler, J., concurring specially). The court's responsibility "to see that the waters of justice are not polluted," Mesarosh v. United States, 352 U.S. 1 at 14 (1956), has been extended beyond control of conduct occurring at trial to matters involving the grand jury. See Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972); United States v. Ramirez, 482 F.2d 807, 811 (2d Cir. 1973), cert. denied, sub nom. Gomez v. United States, 414 U.S. 1070 (1973); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972). By requiring the prosecutor to inform the grand jury of perjured testimony, the court both furthers the responsible exercise of the prosecutorial function, and aids the grand jury in "its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecution . . ." United States v. Dionisio, 410 U.S. 1, 16-17 (1973).

This Circuit has recognized the viability of the Basurto rule in United States v. Guillette, supra. The Court in Guillette agreed that,

" . . . where the government knows that perjured testimony has been given to the grand jury and that this testimony is material to the grand jury's deliberations, due process requires that the prosecutor take such steps as are necessary to correct any possible injustice [citation omitted]. Where jeopardy has not yet attached, it generally is proper for the prosecutor to return to the grand jury and seek a new indictment untainted by the perjury." 547 F.2d at 752-3.

In Guillette, the Court declined to dismiss the indictment since the events subsequent to the witness's grand jury testimony, which the defendants in that case claimed ought to have been disclosed, did no more than cast doubt on the witness's credibility; no evidence was produced which indicated that the witness in question had actually

committed perjury during his grand jury appearance. The record of this case, however, presents a far different picture -- and one which requires relief under the principles of the Basurto rule. Here, not only is witness Buecher's credibility before the grand jury called into question by Moscovitz's trial testimony; not only is witness Moscovitz's own credibility virtually obliterated by his own admissions of untruthfulness; not only is the government alleged by Moscovitz to have known that Moscovitz had lied to it; but additionally, and most critically, Moscovitz testified on cross-examination that he actually "told Mr. Greyer," the prosecutor in this case, that he had lied "on one statement" to the grand jury (A. 360). If true, this testimony, without more, would in all likelihood bring this case squarely within the mandate of Basurto.

It is recognized, of course, that in order for the Basurto rule to apply, the government's discovery of perjured testimony must have occurred before jeopardy attached, and the perjured testimony must have been material to the grand jury's deliberations. The record before this Court regrettably fails to disclose the nature, extent, and timing of the government's knowledge in these matters. Nor does the record disclose the nature, extent, and import of the untruthful aspects of Moscovitz's and Buecher's grand jury testimony, or even of Moscovitz's "one" false grand jury statement which Moscovitz claims to have revealed to the prosecutor. Considering the weighty content of Moscovitz's other admittedly perjurious remarks (see e.g., A. 364-363, 373, 375), it certainly cannot lightly be presumed that this "one statement" was immaterial to the grand jury's deliberations.

Thus, an evidentiary hearing is essential to determine, first, whether the government was aware of this or any other perjured statements

to the grand jury, before jeopardy had attached, and second, whether this or any other such statement was material to the grand jury's deliberations. If both these questions are answered in the affirmative, application of the Basurto rule, as recognized and approved in Guillette, supra, will dictate dismissal of the indictment in this case. Accordingly, the demands of due process and this Court's avowed responsibility to safeguard the integrity of the grand jury system, require remand for an evidentiary hearing as to these important questions of fact.

IV. AN EVIDENTIARY HEARING IS REQUIRED ON
THE ISSUE OF THE GOVERNMENT'S FAILURE
TO LOCATE INFORMANT BUECHER OR TO
DEMONSTRATE THAT REASONABLE EFFORTS
TO DO SO WERE FRUITLESS.

Statement of Relevant Facts and Proceedings

Despite repeated pre-trial defense requests for disclosure of the identity of informants in this case (A. 202-203), the government waited until November 30, 1976, the day before trial, to identify to defense counsel one Margaret Buecher as a government informant who had testified before the grand jury (A. 198, 202, 203, 228, 394). As the government conceded at trial, this disclosure was made "only . . . at the eleventh hour" (A. 228). Furthermore, at the time that Buecher's identity was revealed, the government also announced to the defense that Buecher's whereabouts were unknown and the government had been unable to locate her (A. 198, see 203, 207-208). The government further conceded that it had "established that Miss Buecher was missing several weeks" prior to the trial (A. 289-290). Between the time that the defense learned of Buecher's identity on November 30th and the opening of the trial the next day, the defense did "not [have] any more success than the Government in locating this individual to interview her" (A. 198, see 204).

Accordingly, on the first day of the trial, December 1, 1976, defense counsel raised the issue in court requesting, inter alia, that the government be ordered to "make known to the defense" and "place upon this record, what efforts, if any, [the government] has made to secure this witness" (A. 206, 207), and particularly "whether or not the Government has made a diligent effort" to do so (A. 208, 209). While acknowledging that Buecher was, as a matter of fact, registered as a confiden-

dential informant with the Drug Enforcement Administration in connection with this case (A. 207, see A. 228, also see A. 357-358), the prosecutor disclaimed knowledge of her whereabouts, stating that Buecher had failed to "notify the Drug Enforcement Administration" of "where she would be" (A. 208). Moreover, the prosecutor asserted that the defense request for disclosure of the government's efforts to locate Buecher "has no foundation in law" (A. 207). The trial court, apparently concurring with the government, declined to order the government to comply with the defense request for disclosure (A. 209). The court further declined to instruct the government to expend any effort to locate Buecher so that she could be available for the trial (id.).

Along with the request for knowledge of the government's efforts to locate Buecher, defense counsel also moved for production of Buecher's grand jury testimony (A. 198-200, 202-204; see 228-229), a request which was ultimately granted on the fifth day of trial (A. 291). Perusal of that testimony (A.132-197) reveals that Buecher appeared before the grand jury on two occasions in connection with this case (A.132,106) and that she testified extensively both as a witness to and as an active participant in various criminal events and transactions which form the basis of the indictment against appellants Cooney and Levy. (See e.g., A. 144-147, 164-166, 174-175, 177-179, 180-182, 186-188.) Indeed, at the trial the government took the position that Buecher was an unindicted co-conspirator (A. 294-295); and testimony elicited from witness Moscowitz established Buecher's substantial involvement in the crime charged against the appellants (see e.g., A. 305-312, 318-327) -- as well as her substantial role in assisting the government agents in developing a case against the appellants in the first instance (A. 357-358). Additionally, trial testimony by Moscowitz, as well as tape-recorded telephone statements he made,

casts serious question on the credibility and reliability of the testimony which Buecher actually gave before the grand jury. (See e.g., A. 343-345, 348, 491c-491f.)

Argument

The Trial Court Erred In Refusing To
Require The Government To Make A Diligent
Search For Informant Buecher Or At Least
To Disclose Its Efforts To Secure Her
Appearance.

In the face of the "eleventh hour" disclosure to the defense that Meg Buecher, a registered informant who had testified against the appellants before the grand jury, had become unavailable, the trial court erred in refusing to require the government to expend any effort to locate Buecher for the trial or even to make known what efforts, if any, it had already made in this regard. Moreover, because it excused the government from its obligation to disclose the extent of its efforts, the trial court was unable to make a determination as to whether the government had, in fact, taken reasonable steps to locate Buecher, and this too was error.

While ordinarily the government is not under an obligation to assist a defendant in locating witnesses to an alleged criminal transaction, "fundamental requirements of fairness" demand that an exception be made where the witness in question is a government informant. See e.g., Roviaro v. United States, 353 U.S. 53, 60 (1957); United States v. Williams, 496 F.2d 378 (1st Cir. 1974); United States v. Barnes, 486 F.2d 776 (8th Cir. 1973). The necessity for this distinction -- between an ordinary witness and a government-informant witness -- was persuasively set forth in United States v. Cimino, 321 F.2d 509, 514 (2d Cir. 1963),

cert. denied, 375 U.S. 974 (Waterman, J., concurring in part and dissenting in part):

"Seldom can government informers be expected to be pillars of stability in their communities. If the common understanding is to be credited they are often narcotic addicts or petty criminals whose cooperation with law enforcement officials is not entirely voluntary. Under these circumstances, to give defendants the name . . . of the Government's informer, without revealing the further information about the informer which the Government may be expected to possess, and without aiding defense counsel to find the potential witness, would only further expose the sharp disadvantages which a defendant often faces in preparing his defense"

From this recognition has emerged a set of principles governing the government's obligations with respect to facilitating defense access to an informant. While declining to hold the government to a blanket duty actually "to produce the informant at trial or to guarantee his availability" (United States v. Fuentes, 536 F.2d 527, 534 (2d Cir. 1977), emphasis added), this Circuit, as have others, has imposed upon the government a duty to make a "diligent search for the special employee" if the defense makes a timely request. United States v. Cimino, *supra*, 321 F.2d at 512. See United States v. Tuck, 380 F.2d 857, 859 (2d Cir. 1967); United States v. D'Angiolillo, 340 F.2d 453, 455 (2d Cir. 1965), cert. denied, 380 U.S. 955; United States v. Guera, 334 F.2d 138, 142 (2d Cir. 1964), cert. denied, 379 U.S. 936. As stated in D'Angiolillo, 340 F.2d at 455:

"The rule . . . is that, where the informer's testimony may be relevant to the defense, the defendant is entitled to his name, to such information as the government may have concerning his whereabouts, and to reasonable cooperation in securing his appearance" (emphasis added).^{28/}

^{28/} While this Circuit appears to have been the first to hold that mere disclosure of the identity of an unavailable informer is not

Under this rule, the government plainly owed a duty, in this case, to make a "diligent search" for Buecher -- a confidential informant registered with the Drug Enforcement Administration, as well as a witness before the grand jury in this case -- and to provide "reasonable cooperation" in securing her availability to the defense. This is especially so in light of several critical factors which appear on the record of this case.

28/ cont. from page 54

sufficient and that "reasonable cooperation in securing his appearance" is required (see earlier decisions cited in D'Angiolillo, 340 F.2d at 455), other Circuits have since affirmed the same doctrine, some going so far as to hold that the government's duty of reasonable diligence extends to the actual production of the informant, not merely to locating him.

First Circuit: See, e.g., United States v. Williams, *supra*, 496 F.2d at 382 (the government has a "duty under Roviaro . . . at least to have exercised diligence reasonable under the circumstances to locate the informer); United States v. Diaz, 535 F.2d 130, 134 (1976) (under certain circumstances, the government has a "duty of production" of the informant).

Third Circuit: see, e.g., United States v. Jones, 492 F.2d 239, 242 (1974) (if disclosure of identity is delayed until the trial stage, the government "must take reasonable steps to have [the informant] available when the case is called") (emphasis added).

Seventh Circuit: see, e.g., United States v. Cansler, 419 F.2d 952, 954 (1969), cert. denied, 397 U.S. 1029 ("government is required to show that . . . it has made reasonable effort to produce the informant") (emphasis added).

Eighth Circuit: see, e.g., United States v. Norton, 504 F.2d 342, 345 (1974), cert. denied, 419 U.S. 1113; United States v. Kitchen, 488 F.2d 572 (1973); United States v. Barnes, *supra*, 486 F.2d at 780 (government "owes a duty to make every reasonable effort to have the informant made available to the defense . . .") (emphasis added).

Ninth Circuit: see, e.g., Velarde-Villarreal v. United States, 354 F.2d 9, 13 (1965) (under certain circumstances, government's duty is one of "reasonable efforts to produce" the informer) (emphasis added).

Tenth Circuit: see, e.g., United States v. Hayes, 477 F.2d 868 (1973); United States v. Fancutt, 491 F.2d 312, 314 (1974) ("The Government is required to give reasonable assistance to defendants and their counsel in making it possible for them to procure the informer as their witness").

D.C. Circuit: see, e.g., United States v. Ferguson, 498 F.2d 1001, 1005 (1974), cert. denied, 419 U.S. 1072 (the government is required to exercise "reasonable care to safeguard the informant . . .").

First, courts have explicitly recognized that where, as here, an informant was not merely a "tipster," but was rather an actual witness to, or direct participant in, the crime charged, the government's duty to take reasonable steps to facilitate defense access to the informant is especially acute. See, e.g., United States v. Roberts, 388 F.2d 646 (2d Cir. 1968); United States v. Barnett, 418 F.2d 309 (6th Cir. 1969); Velarde-Villarreal v. United States, supra. As the Eighth Circuit explained in United States v. Barnes, supra, 486 F.2d at 778-79:

"Certainly one of the most relevant factors to be weighed by the court in determining the scope of the government's obligation is whether or not the evidence is material to the accused's defense or a fair determination of the cause.

We think it clear from the cases decided since Rovario that where the witness is an active participant or witness to the offense charged, disclosure will almost always be material to the accused's defense.

. . . [Thus] where the informant is shown to be a material witness and the government does not plan to use the informant as a witness it owes a duty to make every reasonable effort to have the informant available to the defendant to interview or use as a witness, if desired" (emphasis in original).

The court in United States v. Salzmann, 417 F.Supp. 1139 (E.D.N.Y. 1976), aff'd, 548 F.2d 395 (2nd. Cir., 1976), reflected this same principle when it wrote: "When the government relies on information from an informer who witnessed the defendant's actions 'fundamental fairness' requires the government to locate the informer so that the defendant can call the informer as a witness The government's efforts to produce the informer must be reasonable and made in good faith."^{29/}

^{29/} See also, United States v. Russo, 540 F.2d 1152, 1155 (1st Cir., 1976), in which the Court declined to place "a burden of production" on the government in that case in light of several factors including, inter alia, that "even by appellant's version, he [the alleged informant] did not witness or

Here, as Buecher's testimony before the grand jury and Moscovitz's testimony at trial make abundantly clear, Buecher was far more than a mere informant providing relevant information to the government; she was an active participant in various alleged criminal transactions underlying the indictment, and was in fact deemed by the government at trial to be an unindicted co-conspirator in this case (A.294-295). Plainly, the "material" nature of Buecher's information cannot be doubted. Indeed, it appears from witness Moscovitz's admissions on cross-examination that informant Buecher played a central role from the outset in assisting the government in developing its case against the appellants and in obtaining the indictment under which they were tried (A.357-358). Moreover, the indications in Moscovitz's testimony that Buecher may well have lied to the grand jury (see A. 343-345), increases substantially the possibility that Buecher may have provided "material" assistance to the defense, had she been available for pre-trial interviews.

Second, courts have also recognized that when the government withholds notifying the defense until the trial stage that an informant is unavailable -- thus precluding the defense from conducting its own pre-trial search for the witness -- the government's obligation to assist the defense in securing the informant's appearance increases concomitantly. As the Third Circuit stated in United States v. Jones, *supra*, 492 F.2d at 242:

"If for legitimate reasons, the government decides not to identify the informant in advance of trial, then absent

29/ cont. from page 56

participate in the actual crime"; and United States v. Sin Nagh Fong, 490 F.2d 527, 532 (9th Cir. 1974), cert. denied, 417 U.S. 916, in which the Court limited the government's "affirmative duty to produce the informer" to "special facts," including, *inter alia*, cases in which the informant was present when the alleged criminal transactions took place.

special circumstances, it must take reasonable steps to have him available when the case is called, should a ruling in favor of disclosure be made In this case the failure of the government to undertake a serious search for the informant in advance of the date set for trial has not been explained, and hence in the circumstances here we do not consider that the obligation to produce the witness has been met."^{30/}

See also United States v. Diaz, supra, 535 F.2d at 134; United States v. Barnes, supra, 486 F.2d at 779; United States v. Leon, 487 F.2d 389, 393 (9th Cir. 1973), cert. den., 417 U.S. 933, for instances in which courts take into account the factor of government delay in assessing the government's obligation to produce an informant.

Here, of course, the record is undisputed that despite timely defense requests, the government waited until "the eleventh hour" to inform defense counsel of Meg Buecher's identity and then-current unavailability (A. 228). Nor is it disputed that prior to receiving that information the defense had no independent knowledge of Buecher's location.

A third factor which courts take into account in assessing the degree to which the government is obligated in any given case to assist the defense in gaining physical access to an informant is "the extent of the government's control of the witness," United States v. Diaz, supra, 535 F.2d at 134; United States v. Williams, supra, 496 F.2d at 382 -- including whether or not the government has been able to secure the informant's appearance on other occasions when it has served the government's purposes. See Velarde-Villarreal v. United States, supra, 354 F.2d

^{30/} The Jones court recognized that defense counsel, as well as the defendant, may suffer damage as a result of delayed disclosure.

"The life of a trial lawyer is a hectic one at best, and when defense counsel in a criminal case is required to try the case at the same time that efforts must be made to locate a missing witness or secure important information, duodenal lesions may result. More importantly, when prosecutorial error lead to unsuccessful last minute scurrying by the defendant's lawyer, basic rights may be impaired " 492 F.2d at 240.

at 13. Thus, in Velarde-Villarreal, in holding that in that case the government had an affirmative duty to produce the informant, the Court emphasize the fact that the government had been in contact with the informant "from time to time" prior to the trial, stating "If [the informant] is available for hire, he should be available to come and testify." Similarly, in finding a government duty to produce the informer in United States v. Clarke, 220 F.Supp. 905, 909 (E.D.Pa.), remanded on other grounds, 343 F.2d 90 (3rd Cir. 1963), the court stated "Candor compels us to note that [the government agent] seems to have experienced little difficulty in locating [the informant] when he needed his services as a 'special employee' a year earlier." Here, too, the government was able to obtain the physical presence when it served the government's interests to do so. Indeed, the record establishes that Buecher was a "special employee" registered with the Drug Enforcement Administration (A. 207) and that when the government needed her testimony before the grand jury it was able to secure her appearance on two separate occasions. (See A. 132, 159.)

Nor can the government be deemed to have discharged its duty in this case by its perfunctory announcement on the first day of trial that it had no knowledge of Buecher's location and that Buecher had failed "to notify" the government of her whereabouts (see A. 203, 207-208). The inadequacy of this response is particularly striking in light of the explicit defense request that the government "place upon this record what efforts if any [the government] made to secure this witness" (A. 207), and "whether or not the Government

has made a diligent effort" (A. 206, 207). This request was designed to elicit the evidence necessary to determine whether any further steps could be taken to secure Buecher's presence and, moreover, to determine whether or not her unavailability was attributable to a breach of duty by the government. See United States v. Fuentes, *supra*, 563 F.2d at 533. Indeed, it is implicit in this Circuit's requirement that the government make a "diligent search" (United States v. Cimino, *supra*, 321 F.2d at 512) and "accord reasonable cooperation in securing the informant's appearance" (United States v. Tuck, *supra*, 380 F.2d at 859), that the government actually make known to the court what efforts, if any, it has taken to fulfill this duty. Otherwise, if as here, the government is excused from disclosing the extent of its efforts and the degree of its diligence, then it is, in effect, excused from the duty itself; for plainly, it is only by requiring disclosure of the government's actions that the court can assess and evaluate whether or not the government has, as a matter of fact, satisfied its duty to make reasonable efforts and conduct a diligent search.
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As the Court noted in Velarde-Villarreal v. United States, *supra*, 354 F.2d at 13, the question of "whether there was a failure to expend every reasonable effort to obtain the witness" is, in the first instance, "a question of fact for the trial judge."

It is for this reason that the First Circuit noted in United States v. Diaz, supra, 535 F.2d at 13, that "the government would not be held at fault for failure to produce an informant where it could affirmatively show to the court's satisfaction that the production of the informant could not be expected and that its conduct has been diligent" (emphasis added).^{32/} See e.g., United States v. Cansler, supra, 419 F.2d at 954 ("The government is required to show . . . that it made reasonable efforts to produce the informant" (emphasis added)); United States v. Kitchen, supra, 488 F.2d at 573, quoting United States v. Kitchen, 480 F.2d 122, 123 (9th Cir. 1973) (government bears "burden of proving that it was genuinely unable through reasonable efforts to produce" the informant (emphasis added)). At the very least, where, as here, defense counsel brings the issue of an informant's unavailability to the trial court's attention and specifically seeks disclosure of the government's efforts to locate him, the government must, in fact, place upon the record affirmative evidence of its efforts to do so. See United States v. Williams, supra,

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In United States v. Williams, supra, 496 F.2d at 382, the First Circuit stated the requirement of disclosure in more directive language:

" . . . should an informer disappear or become unavailable to the defense, we would compel the government upon timely demand, either to locate him or make an affirmative showing satisfactory to the court why it could not reasonable be expected to do so and of its diligence generally as regards the disappearance" (emphasis added).

496 F.2d at 382; cf. United States v. Fuentes, supra, 563 F.2d at 533.^{33/}

Indeed, in several cases in which this Circuit has found the government to have fulfilled its duty of "reasonable cooperation," it has done so on the basis of a factual record, fully developed at the trial court level, showing precisely what steps the government took in connection with securing the informant's appearance. See e.g., United States v. Guerra, supra, 334 F.2d at 142 in which "the record reveal[ed]" that a government agent had been "recalled to the stand for the express purpose of explaining the government's attempts to locate the informer" and "that several federal agents had expended more than 100 hours in an effort to find [the informant]" (emphasis added); and United States v. Tuck, supra, 380 F.2d at 859 in which "[t]he facts bearing on the Government's efforts" to produce the informant showed that a government agent had made at least four forays into the informant's neighborhood in an effort to

^{33/} In Fuentes this Circuit indicated that it is the failure of a defendant to "press . . . for an examination of the government's attempts to find [the missing informant in that case] or [to] request . . . that a hearing on his whereabouts be held" which may reduce the government's obligation to make an affirmative showing as to the diligence and reasonableness of its efforts. See 563 F.2d at 533. Indeed in Fuentes, the Court of Appeals noted approvingly that the trial court "offered to conduct a hearing on the informant's availability and the extent of the government's efforts to locate him" (id., emphasis added) -- an offer which, however, the defense declined to accept. Here, in marked contrast, it was the trial court which refused to conduct the examination, despite the specific defense request.

See also United States v. Super, 492 F.2d 319, 321 (2nd Cir. 1974) cert. den. 419 U.S. 876 in which the fact that "the availability of [the informant] to the Government is not apparent in the record" was held against the defendant, not the government, precisely because "the defense did not seek to establish that the Government had failed to use reasonable diligence in its search for [the informant] . . . and did not seek to question the Government out of the presence of the jury in an effort to determine what search had been made or what search might be productive . . ." (emphasis added).

find him, and had then reported his "lack of success" and his belief as to why "the informant might be in hiding" directly to the trial judge.

Here, despite the requests of the defense, the trial court improperly excused the government from any obligation either to conduct a diligent search for Buecher or to place upon the record evidence of its pre-trial efforts, if any, to secure her availability. Consequently, there is literally no factual record available to this Court to make a determination as to whether or not the government satisfied its duties in this regard -- and thus there is no factual record available for the appellants to seek to demonstrate, as they are plainly entitled to do, that Buecher's unavailability at trial was the result of government misconduct (see United States v. Williams, supra, 496 F.2d at 382; see also United States v. Barnes, supra, 486 F.2d at 780 and Velarde-Villarreal v. United States, supra, 354 F.2d at 13), or that their rights to a fair trial were substantially impaired by Buecher's absence. See United States v. Barnes, supra, 486 F.2d at 781.

In United States v. Kitchen, supra, 480 F.2d at 1223, quoted in United States v. Kitchen, supra, 488 F.2d at 573, the Eighth Circuit faced an almost identical situation. There, as here, "the trial court [had] excused the government from producing the informant on the government's statement that [the informant's] whereabouts were unknown at time of trial"; there, as here, "[t]he record demonstrate[d] that [the informant] may have possessed material knowledge relating to the defendant's participation" in the crime charged in the indictment; there, as here, there was no factual record developed at the trial-court stage upon which a determination could be made as to whether or not the government had satisfied its obligations

with respect to securing the availability of the informant. In light of these factors, the Court in Kitchen ordered the trial court to hold an evidentiary hearing:

" . . . at which the government shall be given the opportunity of proving if such be the case, that it was genuinely unable through reasonable efforts to produce [the informant] and also, if such be the case, that the government did not take steps to see to it that [the informant] would be or become unavailable as a witness. The burden of proving these things should be on the government."

480 F.2d at 1223, quoted at 488
F.2d at 573

The same result is required here -- and this is especially so in light of the central role which Buecher played in assisting the government to build its case against the appellants, coupled with the possibility raised by Moscowitz's trial testimony and taped telephone statements that Buecher may have lied to the grand jury, and further, in light of the specific request which defense counsel made for precisely such an evidentiary hearing at the very commencement of trial.^{34/}

^{34/}

In considering the importance, in this case, of requiring the government to prove whether reasonable efforts were made to locate Buecher, the Court should also consider that the defense was handicapped not only by the government's failure to produce Buecher, but by its unexplained failure to call Blossy, as it had announced it would, and its failure to produce tape recordings of the three Montagne-Cooney telephone calls. See p. 29, n. 13a.

V. A NEW TRIAL, OR AT THE VERY LEAST AN EVIDENTIARY HEARING, IS REQUIRED IN LIGHT OF THE RECORD EVIDENCE OF IRREGULARITIES IN THE JURY'S DELIBERATIVE PROCESS.

Statement of Relevant Facts and Proceedings

On December 22, 1976, immediately upon the trial court's acceptance of the verdict of guilty for all the defendants, defense counsel moved to set aside the verdict on the grounds, inter alia, that the doubts expressed by Juror Number Ten, Judith Earl, with respect to reaching a verdict, and the use of notes by Juror Number One, Charles Chow, the Foreman of the jury, during the jury proceedings called into serious question the independence of the jury's deliberative process (A. 548-558). These motions were denied from the bench (A. 559). Subsequently, on January 5, 1977, appellants filed a formal motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure,^{35/} to set aside the verdict and for a new trial, or alternatively for a full evidentiary hearing, raising these same challenges (Docket (A. 3)). After reviewing the appellants' motion papers and the relevant portions of the transcribed jury proceedings,^{36/} the trial court issued a written Memorandum - Decision and Order [hereafter "Decision"] denying and dismissing these motions (A. 598). It is from this decision, as well as from their convictions, that Cooney and Levy appeal.

^{35/} These motions were treated as timely under Rule 33 pursuant to an advance request by defense counsel for a few extra days. See Docket (A. 2, 5).

^{36/} On January 24, 1977, transcripts of the relevant portions of the proceedings of December 2 and 22, 1976, were filed with the Court. (Docket (A. 3, 6).)

The facts relating to Juror Earl

Almost on the eve of Christmas, on December 22, 1976, at 11:35 p.m. (A. 535), after a deliberation period of approximately twelve and a half hours (see Decision, A. 598) -- interrupted by at least seven jury requests to have various portions of testimony or exhibits read back (see A. 499, 506, 512, 519-520, 524, 534; see also Decision, A. 609) -- Foreman Chow announced that the jury had "agreed upon" a verdict of guilty for all the defendants (A. 535a). At defense request, the jurors were individually polled (A. 535a, et seq.). When it came time for Juror Earl to indicate her verdict with respect to defendant Kay, however, Earl stated:

"I would like to say not sure, but I say guilty because of the other I would like to say, not sure, but realizing that I am not going to persuade eleven jurors to change their votes" (A. 536)

In response to this unexpected admission of "not sure," the judge made an immediate and direct request that Earl state "[her] verdict, [her] judgment" and Earl replied "Guilty" (A. 536).

However, after concluding the polling, the judge undertook to question Earl about her verdict, and the following colloquy ensued:

"THE COURT: Miss Earl, I am going to ask you, particularly on this last call that we had: did you surrender any convictions because of any pressures on you, or is that your judgment that you find that this Defendant Kay is guilty? You have to use your own judgment.

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: What did you say?

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: I can't hear you.

JUROR NO. 10 (EARL): I definitely feel pressure on this decision.

THE COURT: What kind of pressure? Did you listen to the

opinions of the other jurors?

JUROR NO. 10 (EARL): Yes. I have requested that we ask Your Honor to review the legal advice, or the legal charge that you gave us about the conspiracy, relating to the part where they said that they would have to be involved in only a small portion of the conspiracy, or not to be convicted -- 37/

THE COURT: Well, isn't that --

JUROR NO. 10 (EARL): I don't know.

THE COURT: Wasn't that made clear to you?" (A. 537-538, emphasis added.)

Earl did not answer the judge's last question -- whether the conspiracy charge was "made clear" to her. Rather, she moved on to another point of doubt, which she explicitly characterized as "reasonable" -- Kay's "taking over the conspiracy" (A. 538). At this point, the judge referred directly to the "awkward position" in which Earl had placed the court by her responses (A. 538), and proceeded to question her further, asking her age and whether any "coercion" had been placed upon her to return her verdict (id.).

Earl made one more effort to explain to the court that she "felt unsure" about her verdict on Kay (A. 538). However, when the judge then asked, "You may have felt, but did you finally reach a conclusion that you want reported and made part of the verdict in this case?" (A. 538-539, emphasis added), the following colloquy ensued:

"JUROR NO. 10 (EARL): Yes, I said that I do.

THE COURT: And you do that freely, and that is the point that we are trying to find out. Are you under any pressure? It is your judgment, your own mind has to make the decision.

^{37/} As is discussed further below, pp. 70-71, n. 43, no such request for "review [of] the legal advice, or the legal charge . . . about the conspiracy" was ever conveyed to the court.

JUROR NO. 10 (EARL): I concede that Bruce Kay is guilty.

THE COURT: Do you say he is guilty?

JUROR NO. 10 (EARL): Yes." (A. 539, emphasis added.)

Although immediately after Earl had responded "yes" the judge announced that he would "take her verdict and judgment," he did not do so, but instead, cutting off an objection from counsel, he resumed his questions (A. 539). Four more times the judge asked Earl to confirm her verdict, the last time confronting her with two clear options --

"THE COURT: Now is the time to express it. You have two things, guilty or not guilty" (A. 540, emphasis added) --

and Earl responded "guilty." Although counsel for Kay requested the opportunity to inquire further, the judge abruptly cut off the matter, stating "No, I am going to accept the verdict" (A. 540).^{38/}

Critically, the judge never suggested to Earl a third possibility -- further deliberations; nor did the judge ever make specific inquiry with respect to Earl's express confusion as to the conspiracy charge under which all of the defendants were convicted. In his Decision the judge noted "[t]he failure" of defense counsel to request "direction to have the jury deliberate further before the jury was finally excused," but concluded

"The failure to so move during the trial is not considered a necessary factor in denying these motions since it is my judgment as the trial judge who participated actively, there is no merit to defendants' contention that Juror No. 10 did not render an uncoerced vote of guilty upon the indictments of all four defendants, including defendant Kay or that her votes were not based on understanding of the instructions or should be considered as other than ones made of her own volition" (A. 607).

^{38/} Later, the judge also prevented defense counsel from interviewing Earl before she left the courtroom (see A. 552-553; Decision, A. 607).

The facts relating to Foreman Chow

On December 2, 1976, shortly after the government opened its case in chief,^{39/} the judge noticed that Juror Number One, Charles Chow, was taking notes and announced that he would "not discourage that practice" (A. 226). While cautioning the jury not to rely on Chow's notes but rather to consider all the evidence and refrain from discussing the case until it is submitted (A. 226-227), the judge did remark that Chow's notes contain "what he [Chow] thinks is important" (A. 226). Chow continued to take notes during the course of the trial and, as later emerged, brought those notes with him into the jury room (A. 540-543, 546).

When it came time for the jury to select a Foreman, the judge again singled Chow out for special attention, stating:

"I know the lawyers did talk to Mr. Chow as if he were already elected foreman, but I will leave that up to the democratic process of selection by the jury." (A. 496-497)

The judge's subsequent comment in open court on the jury's selection of Chow was that "[h]e had a headstart in being the foreman" (A. 499).^{40/}

During the course of the jury's deliberations, the judge continued to reinforce Chow's special position among the jurors. Thus, at one point after Chow had described a particular portion of testimony which the jury wished to have read back, the judge openly communicated to the jury the high esteem in which he held Chow, stating:

^{39/} The jury of twelve and two alternates was selected and sworn on December 1, 1976 (Tr. 29-102).

^{40/} Chow's personal credentials may have contributed to his "headstart." At the time that he sat on this case he was a "design engineer . . . involved with advanced technology" at General Electric, Schenectady, New York (A. 213-214, 547), a major employer in the area, and his father had been a lawyer and a judge in China with a position in the Chief Military Tribunal (A. 214).

"you have proven again that your recollection of testimony ^{41/} is remarkable. I have found this remarkable in many cases." (A. 518)

In light of this frankly admiring view of Chow, ^{42/} it is not surprising that throughout the conferences which arose in connection with the jury's requests to have various portions of testimony and exhibits read back to them, the judge repeatedly engaged in direct, sometimes extended, colloquy with Chow (see e.g., A. 518-519, 524-528), and openly gave deference to Chow's judgment as to what it was that the jury wanted. (See e.g., A. 515-^{43/} 516, 524, 528, 534-535.)

After the polling of the jury -- and thus after Juror Earl's doubts

^{41/} It is noteworthy that at this point in the trial, Chow had described his recollection of only one particular portion of testimony desired by the jury (A. 512-513) and had not done so "in many cases." Subsequent to this point, however, Chow did demonstrate a high degree of familiarity with the precise matters covered in specific portions of testimony given by various witnesses (see e.g., A. 512-513, 524-525) -- a familiarity which may, in fact, have resulted from his note taking. See p. 81, n. 48 below.

^{42/} Another aspect of Chow's conduct as a Foreman may have inspired admiration in the judge. The record suggests that Chow tended to minimize the jury's requests. Thus, although the jury's first note requested "all the testimony" of witness Roth, Chow immediately responded to the judge's comment on the "long, long time" compliance with that request would take by stating "we probably do not need that extent, sir . . . we may not need it at all" (A. 500). When the jury next returned to the courtroom, the Roth request had been pared down to a single exhibit (A. 506). And on at least two other occasions, described in detail in note 43 below, Chow informed the court that the jury was satisfied with the particular portion of testimony which had just been read back to it, when, at that time, one or more jurors in fact wished to hear more. See also A. 512-513, 524, where Chow pinpoints a particular portion of a witness's testimony in order to save the court time.

^{43/} It should be noted that the record reveals at least two occasions on which Chow's responses did not accurately reflect what the other jurors felt or desired. First, in connection with the jury's request for Katz's testimony, Chow informed the court that the portion which was initially read "covered . . . the parts" wanted (A. 515). Juror Jankovic immediately made clear, however, that he at least wished to hear a further portion (A. 516). Second, in connection with the request for Roth's testimony, which had been written up by Juror Earl (A. 524), Chow

about the verdict and confusion about the conspiracy charge had already been revealed -- defense counsel requested that Chow's notes be produced and marked as an Exhibit (A. 540). In the questioning which followed, Chow indicated several times that he no longer had the notes, stating that he had "probably throwed [sic] them away" (A. 542), that he had not taken them from "here [the courtroom]" (id.), and that he had "probably destroyed them" (A. 543). It took Juror Earl to point out that there were, in fact, "notes in there [the jury room], written by him" (A. 543). After further questioning, Chow acknowledged that although he had not kept "the complete text of the notes" (A. 545), there was, still in existence in the jury room, a "partial" set (A. 546). Chow also acknowledged that he had actually made notes while in the jury room, stating "sometimes it was during the evening, and sometimes it was when we were in the jury room and I jotted down some of the points" (A. 545). Upon request, Chow then retrieved four pages of his notes from the jury room (A. 546-547) and these were entered into the record as a Court Exhibit (A. 547).

43/ cont. from page 70

indicated that he thought a reading of Roth's direct testimony had satisfied the jury (A. 528) -- even though both defense counsel and the judge had actually observed Juror Earl and possibly one other juror at the time asking Chow to request the cross-examination (A. 530-532). (The fact that when subsequently questioned by the jury, Earl did not press her request for Roth's cross-examination may indicate that Earl had acceded to Chow's lead, rather than that she had changed her mind. This is especially so in light of Earl's demonstrable inability to withstand pressure which emerged somewhat later during the polling process. See pp. 66-68, supra.)

Moreover, the record suggests a third instance in which Chow may have failed to communicate altogether a juror request for further assistance from the court. As pointed out above (p. 67, n. 37), during Earl's colloquy with the judge concerning her doubts about her verdict on defendant Kay, Earl stated "I have requested that we ask your Honor to review the legal advice, or the legal charge that you gave us about the conspiracy . . ." (A. 537); however, no such request was ever conveyed to the court.

Just before his in-court denial of the defense motions to set aside the verdict, the judge once again gave a ringing endorsement to Chow, commenting "I have been on the Bench twenty-eight years and I think [Chow] is one of the most exceptional jurors that we have ever had" (A. 555). In his Decision, the judge reiterated that comment and concluded

"There is nothing shown in the record or elicited by my questioning that would support any suspicion that Foreman Chow made improper use of his personal notes that were made during recesses or after court sessions." (A. 608)

Argument

The Trial Court Erred in Denying Appellants' Motion for a New Trial or an Evidentiary Hearing in Light of the Direct Evidence of Juror Earl's Confusion as to the Conspiracy Charge and the Circumstantial Evidence Suggesting the Improper Use By the Jury of Notes Taken By Jury-Foreman Chow.

Introduction

It is a settled principle of law that before a defendant can be convicted "each individual juror," operating on the basis of his or her own independent perceptions and conclusions, must be convinced of the defendant's guilt beyond a reasonable doubt. United States v. Fioravanti, 412 F.2d 407 (3rd Cir., 1969), cert. den., 396 U.S. 873. Furthermore, it is necessary that each juror's vote be based on an adequate understanding of "the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt" United States v. Clark, 475 F.2d 240 (2nd Cir., 1973). Such an understanding and such independence must characterize each juror's deliberations; absent that, a verdict for conviction cannot stand. See Bollenbach v. United States, 326 U.S. 607 (1946); United States v. Sexton, 456 F.2d 961 (5th Cir., 1972).

On the record of this case it is manifest that the trial judge had before him evidence which called into serious question the independence and understanding of the jury's deliberative process -- direct evidence that at least one juror, Judith Earl, was confused about the charge on conspiracy, the central legal issue in this case; and circumstantial evidence suggesting that the handwritten notes of another juror, the Foreman Charles Chow, who had been elevated by the judge into a position of dominance and prestige, may have been misused during the jury's actual deliberations on the verdict. Appellants submit that in light of this evidence -- and despite the trial court's characterization of it as "a slight ripple in an otherwise uneventful trial" (Decision, A. 610) -- appellants are entitled, at the very least, to a full evidentiary hearing to determine whether or not the jury process in this case was, in fact, compromised and impaired.

- a) Juror Earl's confusion regarding the conspiracy charge should have been abated and absent such abatement a new trial or at least a full evidentiary hearing must be granted.

It is unmistakably clear on the record of this case that Juror Earl expressed confusion as to her own understanding of the conspiracy charge. There is simply no other interpretation which may be given to Earl's unequivocal statement during the polling process: "I definitely feel pressure on this decision I have requested that we ask Your Honor to review the legal advice, or the legal charge that you gave us about the conspiracy" Especially in light of the fact that no such request was ever conveyed to the court and that Earl never received any further explanation as to the central legal question of the case concerning all defendants -- a question with which she was obviously having

difficulty-- Earl's statement of confusion cannot lightly be brushed aside.

It is universally recognized that when a juror is confused as to the legal principles affecting the case, the trial judge must clear up that confusion and the failure to do so will constitute reversible error.

Bollenbach v. United States, supra; United States v. Walker, 557 F.2d 741 (10th Cir., 1977); United States v. Bolden, 514 F.2d 1301 (D.C. Cir., 1975); Price v. Glosson Motor Lines, Inc., 509 F.2d 1033 (4th Cir., 1975); Powell v. United States, 347 F.2d 156 (9th Cir., 1965); Wright v. United States, 250 F.2d 4 (D.C. Cir., 1957) (en banc).^{44/}

In Bollenbach, defendant had been convicted of conspiring to transport stolen securities in interstate commerce. Responding to a jury inquiry after deliberations had begun, the trial judge had given an incorrect instruction regarding the "vital issue" of knowledge and the Supreme Court reversed. Justice Frankfurter writing for the Court, stated in words that are apposite here:

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (326 U.S. at 612-613.)

On the record of this case it simply cannot be presumed that Juror Earl could or did "discharge" her "responsibility for drawing appropriate conclusions from the testimony" as to any of the defendants since, by her own admission, she had not received the "guidance" she required -- and this

^{44/} Indeed, few decisions have even suggested the contrary. "Cases in which a refusal to instruct in response to jury inquiry has been upheld seem to be few and rather limited in their scope." Price v. Glosson Motor Lines, Inc., supra, 509 F.2d at 1037, n. 7.

is especially so in light of the fact that the "guidance" Earl required concerned the central, but rather complex, "legal criteria" in the case: the substance of the crime of conspiracy. A similar situation occurred in Bolden, supra, where the trial judge had refused to offer any further help to a jury troubled about the question of intent in a felony-murder case. There, in reversing the convictions, the Court of Appeals stated:

"Particularly where a difficult legal issue such as intent, which is not precisely defined by the statute, is the subject of the jury's inquiry, the trial court should carefully inform the jury of the law, and not allow the troubled jury to rely on a layman's interpretation of a superficially simple but actually complex statute

We cannot say the error was harmless -- the jury had difficulty with the felony-murder count; there was evidence to support the defense theory; and the jury convicted on the basis of an instruction which did not provide them with the legal information they themselves indicated they needed Because of the lack of 'appropriate judicial guidance' in this instance, the felony-murder convictions must be reversed" (514 F.2d at 1309 (emphasis added)).

Here, while recognizing that "there is unquestionably an affirmative obligation on the trial court to clear up any apparent confusion" expressed by a juror (Decision, A. 604), the trial court sought to dispose of Earl's confusion about the conspiracy charge by reference to two facts, first that "none of the counsel for these defendants made any specific objections" to "the conspiracy portions of the jury charge" (Decision, A. 602), and second, that prior to the original announcement of the "verdict" "there were no requests [by the jury to the court] for any clarification of the instructions that were given or any such indication in the notes when the jurors returned to open court that the jury wanted the court to give further clarification of the instructions" (Decision, A. 610). But these two references miss the point entirely.

First, with respect to the absence of an earlier objection to the conspiracy charge, it is not counsel's satisfaction with the charge, nor even its technical correctness, which is at issue here; rather it is the individual juror's understanding of the "relevant legal criteria." An instruction on a legal point may be totally satisfactory to the legally-trained minds of lawyers and judges, yet still create confusion in the mind of a lay juror -- and it is that confusion which must be cleared up since, in the final analysis, it is the juror who must apply the law to the facts and render a verdict.

Moreover, defense counsel obviously could not have objected to the conspiracy charge on the basis of jury confusion at the time that the charge was delivered for the simple reason that such confusion was not apparent at that time. In any event, the principle of Bollenbach and its progeny is not designed to keep a scorecard on the adequacy of a particular judge's instructions, but rather to insure that a defendant is not tried and convicted by a jury which misunderstands the "relevant legal criteria" pertaining to guilt or innocence. Even though the judge may be totally faultless in his handling of the situation, if it appears from the record that a juror convicted on the basis of inaccurate or confused legal principles, the conviction cannot be deemed valid. As the Court said in United States v. Carter, 491 F.2d 625 (5th Cir., 1974):

"[W]e believe that the jury might have convicted defendant -- not out of conviction based on all proper and relevant testimony, and under the guidance of accurate, precise, and balanced instructions -- but because of an honest misinterpretation of judicial words. An accused is entitled to more."

Second, the fact that the trial court had received no previous requests by the jury for clarification of the conspiracy charge does not

relieve the verdict of its infirmity. Again, what is at issue here is the fact that a juror renders a verdict on the basis of a confused understanding of the law, not the timing of disclosure of that confusion. Moreover, the record is clear that the trial court was put on notice prior to his finally acceptance of the verdict and judgment (see A. 540) that Juror Earl's "verdict" as to all defendants -- since all were accused of conspiracy -- may have been tainted by an inadequate understanding of the "relevant legal criteria." Once on notice, the trial court was not free to try to improve Earl's language^{45/}, nor pressure her into ignoring her own doubts. Indeed, the only alternatives properly available to the judge at that time would have been to ascertain the depths of Earl's confusion or to follow the course prescribed by Rule 31(d) of the Federal Rules of Criminal Procedure -- either to discharge the jury or to direct it to retire for further deliberations as to all defendants, after giving further

^{45/} While the trial court disclaims any "intent on [his] part by the content of the questions or the tone of delivery to coerce or pressure in any way Juror Earl from expressing the verdict she wanted to render" (Decision, A. 611), the objective facts of the record indicate that, the judge's "intent" notwithstanding, Earl was placed in a position by the judge which could not but have exerted "pressure" on her to swallow her doubts and conform her verdict to that of the others. Thus, the trial court informed Earl that her response had placed the court in an "awkward position" (A. 538); he repeatedly interrupted her attempts to explain what she meant (A. 537-538); he asked her "how old" she was and whether she was under "coercion" (A. 538); and finally, after requiring her to say four times that Kay was "guilty" he required her to chose between "two things, guilty or not guilty" (A. 560). At no time did the trial court suggest to Earl that she could delay her final judgment until she was clear in her own mind about the meaning of conspiracy or about her verdict on the defendants. Nor does the fact that "there was no handwringing or sobbing on the part of Juror Earl after she expressed her doubt" (Decision, A. 610) prove an absence of "pressure."

guidance as to the conspiracy charge.^{46/}

As the Court in Wright v. United States, supra, 250 F.2d at 11, noted:

"Where . . . the need for more [instructions] appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task" (emphasis added).

Nor does the fact that defense counsel did not request further deliberations at this point excuse the trial court from its duty pursuant to Rule 31(d). As the record reveals, the trial court's treatment of the matter left defense counsel literally no opportunity to inquire or to pursue the matter further. (See A. 540.) Under such circumstances the absence of an objection simply may not be held to prejudice a defendant. See e.g., United States v. Mathis, 535 F.2d 1303 (D.C. Cir., 1976). Moreover, the trial court, perhaps recognizing that the burden under Rule 31(d) falls upon the court, not defense counsel, explicitly eschewed any reliance on the failure of counsel to seek further deliberations as a ground for his Decision denying appellants relief. (See A. 607.)

Appellants submit that on this record they are, indeed, entitled to relief: the infirmity stemming from Juror Earl's confusion does not constitute a mere "slight ripple," as the trial court would suggest, but rather goes to the very heart of the basis for the convictions in this case. Accordingly appellants should be granted a new trial or, in the alternative, an evidentiary hearing to determine the impact which Earl's

^{46/} Rule 31(d) of F.R.Cr.P. provides -- "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. It upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

confusion -- and her failure to obtain the "legal advice" she had "requested" (A. 537) -- had on appellants rights to a fair trial. Nor would such a hearing fall within the rule prohibiting a juror from impeaching his or her own verdict, since as this Circuit has recognized, that rule "does not preclude the examination of the reasons motivating a juror's vote when that juror, after giving formal assent to the verdict and before judgment on the verdict has been entered, states in open court that he does not agree with the verdict. 6A Moore's Federal Practice ¶59.08(4)." Grace Lines Inc. v. Motley, 439 F.2d 1028, 1031 (1971). Here, since the trial court failed to properly examine the bases for Juror's Earl's reluctant vote, particularly regarding her misunderstanding of the conspiracy charge, after she exhibited such misunderstanding, it is altogether proper -- indeed, it is necessary under "the plainest principles of justice" -- to pursue that examination and fulfill it at an evidentiary hearing. See McDonald v. Pless, 238 U.S. 264, 268-269 (1915), citing Mattox v. United States, 146 U.S. 140 (1892), and United States v. Reid, 53 U.S. 361, 366 (1851).^{47/}

^{47/} The fact that Juror Earl's request for further "legal advice" on the conspiracy charge failed to get before the court until after the "verdict" was originally announced may point up another jury irregularity which calls for an evidentiary hearing to determine if the jury process in this case accorded defendants a fair trial. In light of the two noted instances of Chow's failure to accurately communicate the requests of other jurors for information (see note 43, supra), it may well be that Juror Earl's request for further instruction on the law of conspiracy fell prey to a decision by Chow that the jury did not "need" such instruction, perhaps that it would needlessly waste time.

It should be noted in this connection that the deliberations were occurring through the afternoon and evening of December 22, a little more than 24 hours before Christmas Eve day, and that Chow showed a pattern of taking shortcuts with requests in order to save the court's time. See n. 42.

- b) As evidence on the record suggests that jury-foreman Chow's notes were improperly used, an evidentiary hearing must be granted.

Although the taking of notes by jurors is allowed in this Circuit, United States v. Bertolotti, 529 F.2d 149 (2nd Cir., 1975), and in many other jurisdictions, there are recognized dangers inherent in the process:

"Courts finding juror note-taking improper frequently express the fear that a juror who refers to notes during the discussion of a case may unduly influence the jury and, if the notes are inaccurate or incomplete, either intentionally or innocently, the parties may be seriously prejudiced. Annotation: Taking and Use of Trial Notes by Jury," 14 ALR3d 831 at 834, referring to jurisdictions which disapprove of juror note-taking.

Indeed, in the Bertolotti decision itself, this Court recognized that notes "should not be allowed to take precedence over [the individual jurors'] independent memory of the facts." 529 F.2d at 160.

Appellants submit that under the special facts of this case the likelihood that the notes taken by Jury Foreman Chow were, in fact, allowed to "take precedence over [the] independent memory" of the jurors, and their use during deliberations allowed to unduly influence the jury is particularly great. Indeed, contrary to the trial court's conclusion that "there is nothing shown in the record or elicited by [the court's] questioning that would support any suspicion that Foreman Chow made improper use of his personal notes" (Decision, A. 607, emphasis added), the record reveals numerous factors which do, in fact, support a strong "suspicion" that Chow's notes were improperly used. The critical factors are these:

First, from the outset of the proceedings, Chow's position among the other jurors was inordinately enhanced by the trial judge's unrestrained

praise of Chow's "remarkable" recollection, by his apparent deference to Chow's interpretation of what the other jurors needed for their deliberations (see p. 70, n. 42, 43, supra), and by his grant of permission to Chow to take notes as to "what he [Chow] thinks is important" (A. 226). As the Supreme Court long ago noted in Bollenbach v. United States, supra, 326 U.S. at 612:

"The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him."

It must be assumed, therefore, that to the other jurors, Chow's "remarkable" recollection of the evidence was to be particularly trusted and indeed, the contents of the notes of "what [he] thinks is important" were to carry great weight.^{48/} This is especially so in light of the fact that "the trial covered a three-week period with interruptions that occurred due to other responsibilities of the Court, with a large number of witnesses examined and cross-examined" (Decision, A. 609) and, so far as the record shows, no other juror took notes.

A further factor supporting a definite "suspicion" that Chow's notes may have been improperly used is the simple fact that those notes were not excluded from the jury room. By Chow's own admission he made some of his notes "when we [the jury] were in the jury room and I jotted down some of the points" (A. 545, emphasis added). And, the record is clear, of course, that at the close of the jury's deliberations there remained

^{48/} It is of course quite possible that Chow's "remarkable" ability to remember the evidence was not merely a result of his superior background and abilities (see note 40, supra) but was at least in part a by-product of the fact that he did take notes throughout the course of the long trial.

in the jury room what Chow characterized as a "partial" set of his notes (see A. 546). The very fact that Chow made and kept notes inside the jury room suggests the possibility that during the course of the trial, while writing down his thoughts and recollections, Chow may have been conferring with other jurors about those notes -- and about the contents of those notes -- in direct violation of the interdiction against juror discussions prior to the close of evidence and argument. (See A. 226-227).^{49/} Moreover, the fact that the notes were inside the jury room during the deliberations on the verdict indicates that Chow may have actually used his notes in leading the deliberative discussions of the jury. The further fact that at the close of the deliberations Juror Earl was aware that notes "written by [Chow]" were still "in there [the jury room]" (A. 543) bolsters this likelihood; had Chow kept his notes entirely to himself, Earl presumably would have had no knowledge of their existence inside the jury room.

Nor can it be assumed, in light of this record, that the judge's brief cautionary to the jury on December 2, 1976, the first day of evidence, when the judge first noticed Chow taking notes (A. 226) served to dispel the realistic possibility that the other jurors would look to Chow and his notes for special guidance as to what had been significant at the trial. The fact that, as the trial judge noted in his Decision, "not objection was made . . . to [the Court's] granting permission to take notes or ot [its] cautionary instruction given at that time" (Decision,

^{49/} In Winebrenner v. United States, 147 F.2d 322, 328 (8th Cir. 1945), cert. denied, 325 U.S. 863, the Court explained:

"The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel."

A. 608) does not ensure that the brief instruction was actually followed ^{50/} almost three weeks later when the jury retired to deliberate. Moreover, defense counsel could not have known at the time that the trial court granted Chow permission to take notes that Chow would be elevated to a position of dominance and prestige, nor that he would write up and keep notes inside the jury room.

A final factor which cannot be ignored in evaluating whether the record supports a definite "suspicion" that Chow's notes were improperly used is the plain fact that Chow was less than candid with the court when questioned about the existence and whereabouts of those notes. Indeed, initially Chow specifically denied that any of his notes were still in existence (A. 542-543) and further misrepresented to the court that he had not taken them from "here [the courtroom]" (A. 542). It was only after Juror Earl spoke up and informed the court that contrary to Chow's

^{50/} Although not objectionable in itself, the trial court's brief instruction not to rely on Chow's notes was certainly less forceful than it might have been. Compare the following instruction approved in Toles v. United States, 308 F.2d 590, 594 (9th Cir. 1962):

"It is perfectly proper for a juror to take notes, but bear in mind they are your notes. They are not a transcript of the case. You can't for instance, pull them on the other jurors and say, 'See, I got a note of this.' . . . [T]he notes are taken simply as an aid to memory and . . . the jury understands they are to recall the testimony and use the notes only for that juror's assistance in that regard and not as an authoritative thing to show to other jurors"

with the trial court's instruction here:

"I do notice that Mr. Chow is taking notes and I do not discourage that practice because it is established in our courts that it can be done by a jury and I permit it and I remember years ago when I started, we had some discussion about whether it should be allowed or not, and the juror in question said, well, I was taking notes so he decided he should take them. So I allowed it, but I do caution you that they are his notes and that he is taking what he thinks is important, like I may, and you have to consider it all and keep that in mind, and you should not discuss the case anyway until it is submitted to you" (A. 226-227).

representations, there were, in fact, "notes in there [the jury room] written by him" (A. 543) that Chow acknowledged their "partial" existence (A. 546). Surely this lack of candor should have put the trial court on notice that further inquiry was needed here.

Appellants submit that on this record it simply cannot be said that there is "nothing . . . to support any suspicion that Foreman Chow made improper use of his personal notes," nor that Chow and his notes did not unduly influence the jury. Certainly, if, as is suggested by the record, the notes were the focal point of jury discussion prior to the commencement of the deliberative process, or were used by Chow in leading the actual deliberations, then their use was plainly improper. See United States v. Bertolotti, supra, 529 F.2d at 160; Toles v. United States, supra, 308 F.2d at 594. Accordingly, especially since the trial court failed to make any inquiry whatsoever concerning the actual use by Chow or by the other jurors of Chow's notes, appellants are entitled to an evidentiary hearing to determine precisely what occurred with respect to the use of Chow's notes and whether their right to be tried by a jury of independent persons, each operating on the basis of his or her own observations and conclusions, was abrogated in this case. Such a hearing would not seek to impeach the verdict of the jury, but rather would seek to explore the "objective facts" concerning the use of Chow's notes to determine if, as the record strongly suggests, "internal impropriety" characterized the jury deliberative process in this case. See United States v. Dioguardi, 492 F.2d 70, 79, n. 12 (2d Cir. 1974). That such a hearing is mandated here is clear from the words of the Court in Baker v. Hudspeth, 129 F.2d 779, 782 (10th Cir. 1942), cert. denied, 317

U.S. 681, rehearing denied, 317 U.S. 711, 318 U.S. 800:

"If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case . . . a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict" (emphasis added).

CONCLUSION

For the foregoing reasons appellants Kevin T. Cooney and Harold T. Levy respectfully request that their convictions for conspiracy be reversed and remanded for a new trial on the grounds that they were tried and convicted on a body of seriously prejudicial evidence at variance with the indictment, and before a jury in which at least one juror was confused about the charge on conspiracy.

In the alternative, appellants respectfully request that their case be remanded for evidentiary hearings on the issues of: (1) whether they have standing to contest the search which led to the introduction against them of seriously prejudicial evidence; (2) whether the government knew before jeopardy had attached that material testimony presented to the grand jury was perjured; (3) whether the government complied with its duty of making reasonable efforts to secure the appearance of a missing informant witness; and (4) whether the jury's deliberative process was fatally impaired by the confusion of one juror as to the charge on conspiracy and by improper use of

a juror's notes in arriving at its verdict.

Respectfully submitted,

MARTIN G. WEINBERG
OTERI & WEINBERG
10 Post Office Square
Boston, Massachusetts 02109
(617) 227-3700

Attorney for Appellants
Kevin T. Cooney and Harold J. Levy

Of Counsel:

JEANNE BAKER
ROSENBERG, BAKER & FINE
133 Mt. Auburn Street
Cambridge, Massachusetts 02138
(617) 354-2937

On the Brief:

Stephanie Cleverdon

